TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1854.

No. 135.

GEORGE S. WHITAKER AND MARY I. WHITAKER,
PLAINTIFFS IN ERROR,

vs.

THOMAS McBRIDE AND WILLIAM H. KILGORE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 24, 1854.

(19,101.)

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THOMAS McBRIDE AND WILLIAM H. KILLGORE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 THOMAS MCBRIDE, Appellant,
v.
GEORGE W. WHITAKER and —— WHITAKER, His Wife, Appellees, Impleaded with William H. Kilgore and —— Kilgore, His Wife, Appellants. } No. 11090.

Pleas before the supreme court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 7th day of January, A. D. 1902.

Present: Hon. J. J. Sullivan, chief justice, Hon. Silas S. Holcomb, judge, Hon. S. H. Sedgwick, judge.
Attest:
LEE HERDMAN, *Clerk.*

Be it remembered, that on the 29th day of November, 1899, there was filed in the office of the clerk of said supreme court a certain transcript in the words and figures following, to-wit:

2 THOMAS MCBRIDE, Plaintiff.
v.
GEORGE WHITAKER ET AL., Defendants.

STATE OF NEBRASKA, *County of Buffalo,* } *ss:*

Pleas before the district court of Buffalo county, Nebraska, at a term begun and holden in the county of Buffalo on the 22nd day of May, 1899, before Honorable Homer M. Sullivan, judge of said district court; Hon. Homer M. Sullivan, judge; Silas B. Funk, sheriff; Peter O'Brien, clerk; W. D. Oldham, attorney for plaintiff; Fred A. Nye, attorney for Whitakers; E. C. & H. V. Calkins, attorneys for Kilgore.

Be it remembered, that on the 27th day of June, 1898, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, the petition of the plaintiff in the case of McBride *vs.* Whitaker in the above entitled cause, said petition being in the words and figures following:

In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
v.
GEORGE W. WHITAKER and —— WHITAKER, His Wife, and William Kilgore and —— Kilgore, His Wife, Defendants.

To Quiet Title.

Plaintiff complains of defendants and for cause thereof allege:

3 First.

That plaintiff is the owner in fee simple of the following described lands situated in Buffalo county, Nebraska, to-wit: Lots eight (8), in section twelve (12) township eight (8) range fifteen (15) and lots 5 section thirteen (13) township eight (8) range fifteen (15).

Second.

4 That there is an unsurveyed island containing about eighteen acres lying in the north part of said lots and within the meander line of the survey of said lots separated from the main body of the lands comprising said lots by a narrow channel of the Platte river known as Mosquito channel, but all belonging to and constituting the riparian accretion to said lots aforesaid owned by this plaintiff.

Third.

That the defendants, George Whitaker and —— Whitaker his wife have entered onto the island above described and are wrongfully claiming the same as their own and are denying the ownership of this plaintiff therein.

Fourth.

That the defendant- William H. Kilgore and —— Kilgore his wife claim an interest in a part of the island above described as the riparian accretion to lands owned by them lying immediately north of said island.

This plaintiff therefore prays that the title to the land herein described be forever quieted in this plaintiff and the claims of the defendant to any right, title, to said lands be held for naught, and that in a final determination of this suit a writ of ouster be awarded plaintiff for the immediate possession of said premises.

THOMAS MCBRIDE, *Plaintiff*,
By W. D. OLDHAM, *Attorney*.

STATE OF NEBRASKA, } ss:
Buffalo County, }

This affiant, the plaintiff, on his oath says that he has read the above and foregoing petition, is acquainted with the contents thereof and the matters and facts therein alleged are true as he verily believes.

THOMAS McBRIDE.

Subscribed and sworn to before me this 19th day of September, 1898.

[SEAL.] PETER O'BRIEN,
Clerk District Court,
By LEILLA SHAFTO, *Deputy.*

5 On the 27th day of June, 1898, there was issued out of the office of the clerk of the district court of Buffalo county, Nebraska, in said cause a summons directed to the sheriff of Buffalo county, Nebraska, being in the words and figures following:

STATE OF NEBRASKA, } ss:
County of Buffalo, }

To the sheriff of said county:

You are hereby commanded to notify the defendants George Whitaker and —— Whitaker his wife, and William Kilgore and —— Kilgore his wife that they have been sued by Thomas McBride in the district court of said county and unless they answer on or before Monday the first day of August, A. D. 1898, the petition of said plaintiff against them filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on Monday the 11th day of July, A. D. 1898.

Witness my signature and the seal of said court this 27th day of July, A. D. 1898.

Witness my signature and the seal of said court this 27th day of June, 1898.

[SEAL.] PETER O'BRIEN, *Clerk,*
By LEILLA SHAFTO, *Deputy.*

Endorsed: To quiet title.

And on the 2nd day of July, 1898, there was returned and filed in the office of the clerk of the district court of Buffalo county, Nebraska, the said summons endorsed in the words and figures following:

6 STATE OF NEBRASKA, } ss:
County of Buffalo, }

Received this summons on the 27th day of June, 1898. I hereby certify that on the first day of July, 1898, I served the above summons on the above named George W. Whitaker and —— Whitaker his wife by leaving each of them at their usual place of residence a true and certified copy of the above summons with all the endorsements thereon. I did not serve William H. Kilgore and —— Kilgore his wife by order of plaintiff's attorney.

All done in Buffalo county, Nebraska.

S. B. FUNK, *Sheriff.*

Service and return $.75, copy (2) $.50, mileage $.80. Total $2.05.

And thereafter, on the 16th day of July, 1898, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, the motion to strike in the above entitled cause, said motion being in the words and figures following:

In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
v.
GEORGE WHITAKER ET AL., Defendants.

Motion.

Comes now the defendant George Whitaker and moves the court to strike the petition of the plaintiff from the files for want of verification.

GEORGE WHITAKER,
By FRED A. NYE, *His Attorney.*

7 And thereafter on the 15th day of September, 1898, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, the answer of the defendants Kilgore to plaintiff's petition in the above entitled cause, being in the words and figures following:

"In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE WHITAKER and —— WHITAKER, His Wife; WILLIAM H. Kilgore and Sophia A. Kilgore, His Wife, Defendants.

And now comes William H. Kilgore and Sophia Kilgore his wife, and for answer to plaintiff's petition allege:

First.

That the said William H. Kilgore is the owner and in possession of all the lots numbered six (6), and seven (7) in section twelve (12) and lot two (2) in section thirteen (13) township eight (8) range fifteen (15) and all the lands south thereof to the centre of said Mosquito channel; that the land lying south of said lots as surveyed has by accretion and reliction become a part of said lots.

Wherefore the said defendants pray that their said right to said lands be ascertained and that the boundary line between their said lands and that of plaintiff be established and that said defendants have such other and further relief as may be meet and agreeable to equity.

E. C. & H. V. CALKINS,
Attorneys for Defendants William H. and Sophia Kilgore.

STATE OF NEBRASKA, } ss:
Buffalo County, }

William H. Kilgore being first duly sworn deposes and says that he is the defendant above named, that he has heard read the foregoing answer and that the facts therein stated are true as he verily believes.

W. H. KILGORE.

Subscribed in my presence and sworn to before me this 13th day of September, 1898.

[SEAL.] E. C. CALKINS,
Notary Public.

Commission expires September 24, 1901.

8 At a session of the district court continued and held pursuant to adjournment at the court house in the city of Kearney, county of Buffalo and State of Nebraska, on the 19th day of September, 1898, the Honorable Homer M. Sullivan being present and presiding in said court, the following among other proceedings were had and done, to wit:

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE WHITAKER ET AL., Defendants.

Equity.

Now on this 19th day of September, 1898, this cause being called, the court being fully advised in the premises, doth order that the defendants be and are hereby directed to plead herein by tomorrow morning.

9 And thereafter on the 20th day of September, 1898, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, in said cause, the motion to make definite and certain, being in the words and figures following:

In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE WHITAKER ET AL., Defendants.

Motion of Defendants Whitaker.

Defendant Whitaker moves the court to compel the plaintiff to make the petition more definite and certain by stating where the north line of said lot is, whether it is the centre of Mosquito channel or the main channel referred to in the petition.

FRED A. NYE,
Attorney for Defendant Whitaker.

10 At a session of the district court continued and held pursuant to adjournment at the court house in the city of Kearney, county of Buffalo and State of Nebraska, on the 20th day of September, 1898, the Honorable Homer M. Sullivan being present and presiding in said court, the following among other proceedings were had and done, to wit:

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE WHITAKER ET AL., Defendants.

Motion and Demurrer Overruled.

Now on this 20th day of September, 1898, this cause came on for hearing before the court upon the defendant's motion to strike, which motion was duly argued and submitted to the court, having fully considered the same, the court doth overrule said motion. To which ruling of the court the defendant excepts.

And this cause coming on for further hearing the defendants' demurrer to plaintiff's petition is taken up, argued and submitted, and the court having fully considered the same doth overrule said demurrer. To which defendant duly excepts. Defendants to answer in ten days.

11 And thereafter on the 21st day of September, 1898, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, the demurrer of the defendants Whitaker

in the above entitled cause, said demurrer being in the words and figures following—

In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE WHITAKER ET AL., Defendants.

Demurrer of Defendants Whitaker.

Defendants Whitaker demur to plaintiff's petition for the reason that the allegations therein contained are not sufficient to constitute a cause of action against these defendants.

FRED A. NYE,
Attorney for Defendants Whitaker.

12 On the 12th day November, 1898 there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, the answer of defendants Whitaker to the cross-petition of defendant Kilgore in the above entitled cause, said answer being in the words and figures following:

" In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE WHITAKER, MARY I. WHITAKER, WILLIAM KILGORE, *et al.*, Defendants.

Answer of Defendants George and Mary I. Whitaker to Cross-petition and Answer of William Kilgore.

Come now the defendants, George and Mary I. Whitaker, his wife, and for their answer herein allege as follows, to wit:

First.

That this court has no jurisdiction of the subject matter involved in this case.

Second.

That the allegations of the petition do not present facts sufficient to constitute a case in equity.

Third.

The plaintiff has an adequate remedy at law.

Fourth.

That said George Whitaker is of lawful age, a head of a family, a citizen of the United States and of the State of Nebraska.

Fifth.

That said George Whitaker has never used his homestead rights under the homestead laws of the United States.

Sixth.

That this defendant is in possession of the land lying south of said lots having entered upon said land for the purpose of making proof thereon under the homestead laws of the United States.

Seventh.

That said land has not by accretion and reliction become a part of said lots.

13 Eighth.

That said land has never been entered upon or proved up upon by any one, and said defendants, William H. and Sophia Kilgore have no right, title, or interest in the said lands.

Ninth.

That these defendants deny each and every allegation contained in said cross-petition and answer not herein specifically admitted.

Wherefore these defendants pray that they may go hence without day and recover their costs and that the court decree said lands to be Government lands and subject to entry; and that said defendants be decreed to have no right, title or interest in said lands, and that these defendants be in lawful possession thereof, and for such other and further relief as may be just and equitable.

GEORGE AND MARY I. WHITAKER,
By FRED A. NYE, *Their Attorney.*

STATE OF NEBRASKA, }
Buffalo County, } *ss.*:

George Whitaker, one of the defendants in the above case, being first duly sworn says that he has read the foregoing answer and believes the allegations therein contained are true.

G. S. WHITAKER.

Subscribed in my presence and sworn to before me this 26th day of September, 1898.

CHARLES REILLY,
Notary Public.

[SEAL.]

My term expires January 9th, 1900.

14 And thereafter on the 12th day of September, 1898, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska the answer of defendants Whitaker to plaintiff's petition in the district court of Buffalo county, Nebraska, said answer being in the words and figures following:

"In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE WHITAKER, His Wife, ET AL., Defendants.

Answer of Defendants, George and Mary I. Whitaker.

Comes now the defendants George and Mary I. Whitaker his wife and for their answer herein allege as follows, to wit:

First.

That the court has no jurisdiction of the subject matter involved in this case.

Second.

That the allegations of plaintiff's petition does not state facts sufficient to constitute a case in equity.

Third.

The plaintiff has an adequate remedy at law.

Fourth.

That said George Whitaker is a citizen of the United States and of the State of Nebraska. That he has never used his homestead rights under the homestead laws of the United States. That he is of lawful age, a head of a family.

Fifth.

That this defendant for the purpose of entering upon lands under the homestead laws of the United States, has entered upon and settled upon a tract of land unsurveyed and unoccupied located in section 12 (12) town eight (8) range fifteen (15), Buffalo county, Nebraska. That said tract has never been entered upon or settled upon or proved upon by any one, and contains twenty-seven and one half acres in said section twelve (12).

15 Sixth.

That said tract of unsurveyed land is not within the meander line on the north side of said lot eight (8) in section twelve (12) and

not within the meander line on north side of said lot five (5) in section thirteen (13) but lies north of said meander line.

Seventh.

That plaintiff has no title, right or interest in said tract of land.

Eighth.

That plaintiff never entered or proved upon *on* said tract, nor has he any title, right or interest by, under or through any one to said tract.

Ninth.

That the said tract of land is owned by the United States Government, is subject to entry, and this defendant now lives on said tract under his right as a citizen under the homestead laws of the United States.

Tenth.

That these defendants deny each and every allegation contained in plaintiff's petition, not herein specifically admitted.

Wherefore these defendants pray that they may go hence without day and recover their costs and that the court decree said lands to be Government lands subject to entry and that the plaintiff be decreed to have no right, title or interest in said lands, and that defendant, George Whitaker, be in lawful possession thereof.

GEORGE AND MARY I. WHITAKER,
By FRED A. NYE, *Their Attorney.*

STATE OF NEBRASKA, } ss:
Buffalo County, }

George Whitaker being first duly sworn on oath says he is one of the defendants in this action, that he has read the foregoing petition and believes that the allegations therein contained are true.

G. S. WHITAKER.

Subscribed in my presence and sworn to before me this 15th day of July, 1898.

CHARLES REILLY,
Notary Public.

My commission expires Jan. 9, 1900.

16 At a session of the district court continued and held pursuant to adjournment at the court house in the city of Kearney, county of Buffalo and State of Nebraska, on the 15th day of February, 1899, the Honorable Homer M. Sullivan being present and presiding in said court the following among other proceedings were had and done, to wit:

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE WHITAKER ET AL., Defendants.

Now on this 15th day of February, 1899, this cause came on for hearing before the court whereupon the defendant- requests, and upon due consideration by the court, *is* granted leave to amend by interlineation so that the same shall contain an allegation that plaintiff and cross-petitioner have "an adequate remedy at law."

And thereafter on the 15th day of February, 1899, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, in said cause, the reply of Thomas McBride being in the words and figures following:

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE WHITAKER ET AL., Defendants.

Comes now the plaintiff, Thomas McBride, and for reply to the amended answer of the defendant- George Whitaker and Mary I. Whitaker denies each and every allegation of the new matter therein contained.

THOMAS McBRIDE, *Plaintiff*,
By W. D. OLDHAM, *Attorney*.

17 And thereafter on the 15th day of February, 1899, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, the reply of defendants Kilgore in the above entitled cause, said reply being in the words and figures following.

In the District Court of Buffalo.

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE W. WHITAKER, MARY I. WHITAKER, WILLIAM H. KILGORE, and Sophia Kilgore, Defendants.

And now comes William H. Kilgore and Sophia A. Kilgore and for reply to the answer of George W. Whitaker and Mary I. Whitaker deny each and every allegation of new matter therein contained.

E. C. & H. V. CALKINS,
Att'ys for Defendants.

STATE OF NEBRASKA, } ss:
Buffalo County, }

E. C. Calkins being first duly sworn deposes and says he has read the foregoing reply and believes the facts therein stated to be true.

Deponent further says that defendant William H. Kilgore is absent from said county of Buffalo and deponent is one of the attorneys for said defendant.

E. C. CALKINS.

Signed and sworn before me February 15, 1899.

—— ——.

18 On the 12th day of June, 1899, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, the amended petition of plaintiff in the above entitled cause, said amended petition being in the words and figures following:

District Court, Buffalo County.

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE WHITAKER, —— WHITAKER, His Wife, WILLIAM H. KILGORE and —— Kilgore, His Wife, Defendants.

Amended Petition.

The plaintiff complains of the defendants and for cause of action against them alleges:

First.

That plaintiff is the owner in fee simple of the following described lands situated in Buffalo county, Nebraska, to wit: Lots eight (8) in section twelve (12) township eight (8) range fifteen (15) and lot five (5) in section thirteen (13) township eight (8) range fifteen (15) according to the survey thereof made under the orders of the surveyor general of the United States under authority of the various acts of Congress relating to the survey of the public lands of the United States, and particularly under the act of Congress relative to the survey and entry of the Fort Kearney military reservation of which said lands are a part, and according to the official map of said survey duly made and filed in the office of the surveyor general.

Second.

That according to said survey the said lots were bounded on the north by a certain channel or branch of the Platte river known and designated on said map and survey as Mosquito channel.

Third.

That the land in said section twelve (12) lying north of said Mosquito channel was surveyed into lots numbered six (6) and seven (7) and the northwest quarter of section twelve (12) and lot two (2) in

section thirteen (13) which lots are now owned by said de-
19 fendants Kilgore and that said lots are bounded on the south according to said map or survey by the north bank of said Mosquito channel.

Fourth.

That where said Mosquito channel passes through between the plaintiff's said land and the lots so as aforesaid owned by the defendant Kilgore there was formed in said Mosquito channel a low, wet island or middle ground which in dry time and low stage of water in the Platte river separate the said Mosquito channel into two streams or channels which unite both above and below the said island or middle ground.

Fifth.

That said island or middle ground was never surveyed and that the Government of the United States who owned and surveyed said land afterwards and on or about the 28 day of March, 1885 granted the said lot eight (8) in section twelve (12) and lot five (5) in section thirteen (13) to this plaintiff without any reservation, and the plaintiff alleges that by virtue of said grant he took to the centre of the thread of the stream of said Mosquito channel. That said lots six and seven in section twelve (12) and lot two in section thirteen (13) were afterwards granted by the United States to the said Kilgore without any reservation of said island or middle ground, so that the bed of the said Mosquito channel and the island therein and middle ground thereof are owned by the plaintiff and defendant Kilgore, but that the boundary line between them has never been marked or ascertained. That the meander line as shown by the field notes and map of said Government survey do not coincide with the banks of said Mosquito channel as they now exist, and that there exists a controversy between the plaintiff and defendant Kilgore as to where said boundary line should be located.

Sixth.

That owing to the dam-ing of the channels further up the stream and the general subsidence and recession of the waters of the Platte river said island and middle ground which was at the time of said survey covered with water at high stages has become much dryer and more valuable for pasture and susceptible for use for agricultural purposes and that on or about the first day of April, 1897, the defendants Whitaker moves upon said island or middle ground
20 and have erected a house thereon and claim the same as their own, but that in truth and in fact the said Whitakers have no right, title or claim of any kind to said land and are mere trespassers, but whether they are upon this plaintiff's land or the land of *the* Kilgore or both this plaintiff is, on account of the uncertainty of the location of said boundary line, unable to say, but that said

island or middle ground is owned by this plaintiff or said Kilgore, and has been in the possession of this plaintiff and said Kilgore for more than ten years before the said entry of the said Whitakers.

Wherefore plaintiff prays that the title to the lands herein described be forever quieted; that the boundary line between this plaintiff and said defendant Kilgore be ascertained and declared and that a writ of ouster be granted plaintiff for the possession of said premises.

W. D. OLDHAM,
Attorney for Plaintiff.

STATE OF NEBRASKA, } ss.:
Buffalo County, }

Thomas McBride being first duly sworn deposes and says that he is the plaintiff in the above and foregoing action; that he has read the above and foregoing petition and knows the contents thereof and believes the facts therein stated to be true.

— —.

21 On the 12th day of June, 1899, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, the amended answer of defendant Kilgore in the above entitled cause said amended answer being in the words and figures following:

In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE S. WHITAKER, MARY I. WHITAKER, WILLIAM H. KILGORE, and Sophia Kilgore, Defendants.

Amended Answer.

And now comes the above named defendants, William H. Kilgore and Sophia A. Kilgore his wife, and for answer to the plaintiff's amended petition allege:

First.

That at all the time mentioned the defendant William H. Kilgore was the owner in fee simple and in the possession of the following described lands: the tenements situate in the county of Buffalo and State of Nebraska, described as follows: Lots six and seven in section twelve (12) and lot two in section thirteen (13) township eight (8) north of range fifteen (15) west according to the Government survey.

Second.

That said lots lie on the north bank of Mosquito channel, one of the channels of the Platte river, and south of said lots and channel

of the Platte river there is situated certain middle grounds or island which was left unsurveyed at the time of the Government survey of the adjacent lands.

Third.

That while said island or middle grounds remained unsurveyed the United States granted to Abraham Rayburn said lots numbered six (6) and in the same manner and while same — said land was unsurveyed the United States granted unto William Walker the said lot numbered seven (7) in section twelve (12) lot numbered two (2) in section thirteen (13).

Fourth.

22 That the grants so as aforesaid made to said Rayburn and said Walker were made with reference to said Government survey which bounded said lots from the north bank of said Mosquito channel. That the meander line- of said survey along the north bank *is* as indicated by the field notes and map thereof do not coincide with the actual lines of said north bank as it now exists, but cross said bank and include in the boundaries of said lot a large part of said island or middle ground. That said grants were without any reservation of said island or middle ground and that the said grantee took by virtue thereof to the centre of said Mosquito channel, but that on account of discrepancy of said original survey the said line remains doubtful and uncertain.

That the lots so conveyed to the said Rayburn *was* by him conveyed to the defendant William H. Kilgore by deed dated on the 14th day of September, 1889, and that the lots so as aforesaid granted to the said William Walker *and was* by said William Walker conveyed to the defendant William H. Kilgore by deed duly executed and dated the 26th day of October, 1889.

Sixth.

That the defendant William H. Kilgore by himself and his said grantors has been in possession of said lots including said island or middle ground to the centre of said Mosquito channel ever since the entry of said lots by said Rayburn and Walker.

Wherefore these defendants pray that the said defendant William H. Kilgore may be adjudged to be the owner of said island or middle ground to the centre or thread of said Mosquito channel and that the same may be the judgment of this court be determined and fixed, and that these defendants may have such other and further relief as they may be entitled to.

E. C. & H. V. CALKINS,
Attorneys for Defendants Kilgore.

23 At a session of the district court continued and held pursuant to adjournment at the court house in the city of Kear-

ney, county of Buffalo and State of Nebraska on the 13th day of June, 1899, the Honorable Homer M. Sullivan being present and presiding in said court the following among other proceedings were had and done to wit:

THOMAS McBRIDE, Plaintiff,
vs.
GEO. S. WHITAKER, —— WHITAKER, His Wife; WILLIAM H. Kilgore and —— Kilgore, His Wife, Defendants.

Judgment.

Now on this 13th day of June, 1899, this cause came on for hearing and trial before the court the parties hereto appearing by their respective attorneys, this cause is submitted to the court upon the pleadings, the evidence offered and introduced therewith, and the argument of counsel, and the court having considered the same being advised in the premises, finds:

That the plaintiff McBride at the time of the bringing of this suit was the owner of lot eight (8) in section twelve (12) township eight (8) range fifteen (15) in Buffalo county, Nebraska. That he made the original entry therefor and obtained title to the same by the United States patent, and has been in the open and notorious possession of the same for fifteen or 20 years.

The court further finds that the defendant W. H. Kilgore at the beginning of this suit and for a long time prior thereto was the owner of lots 6 and 7 in said section; that he became the owner of the same by virtue of a deed to him from the original patentee of said tract, and that he has been in possession of the same for more than ten years prior to the bringing of this suit.

That said tract of land, with other land, was within the extreme channels of the Platte river; and that lying between lots six and seven on the north and lot 8 on the south, was a tract of land in said section 12, of about 22 acres entirely surrounded by certain channels of the Platte river, and which is the tract of land in dispute herein.

That the Government surveyor- when originally surveying
24 said lots 6 and 7 did not actually survey the meander line forming the south line of lots six and seven as they were required to do; but that instead of making an actual survey of said meander line along the said channel bordering on said lots 6 and 7, they falsely show upon the map made by them that they had done so, and located upon said plat what they supposed to be the true meander line of said lots 6 and 7. That they never made an actual survey of the north meander line of said lots 8 but indicated upon the plat made by them what they supposed to be the meander line of said lot 8. That they never actually surveyed the meander lines of said tract of land lying between lots 6 and 7 on the one side and lot 8 on the other and which tract is spoken of in the evidence as

an island but that they indicated upon the plat the general outlines of said island as they understood it to be.

The court further finds that said channels bordering said tract in dispute, the one being on the south of lots 6 and 7, and the other on the north of lot 8, are substantially the same now as they were at the time the original survey was made, and that said channels are substantially as shown by the plaintiff's plat marked Plaintiff's Exhibit "A" offered in evidence.

The court further finds that the defendant Kilgore at all times since he became the owner of said lots 6 and 7 claimed to be the owner of the tract in dispute as part of his lots 6 and 7 that such claim had not extended over the period of ten years at the bringing of this suit; that he had possession during a part of the time of all said tract and all the time a part of said tract.

That McBride ever since he obtained his final receipt to lot 8 has claimed to be the owner of a part of said island; that they together have had the title to lot- 6 and 7 on the one side and lot 8 on the other and have had possession of the island for more than ten years prior to the bringing of this suit, but that they were contending between themselves during said period as to what part of said island each should have and did not agree.

The court further finds that the south line of said lots 6 and 7 is the channel line as shown in Exhibit "A," and that the north line of said lots 8 is the channel bounding it on the north, as shown in said Exhibit "A."

As a matter of law the court concludes that said island should have been surveyed by the Government surveyor-; that it was a neglect of duty on their part to not survey the same. That the title to said island still remains in the United States. That it was never the intention of the Government at the time it gave its patent to said lots 6 and 7 to convey any part of the island, nor was it the intention of the Government to convey it to the patentee of lot 8; that the only interest the defendant Whitaker has in the said land is that he claims the right to enter the same as a homestead and that his right is only what possession would give him, and that he has no title thereto.

The court further concludes as a matter of law that the Government is not bound by the failure of the surveyor hired to do this work by his neglect to perform his duty, and that his failure to actually survey said island did not thereby give the parties to whom the Government granted the land on either side thereof any right to it. To which findings the plaintiff and defendant Kilgore each except.

It is therefore considered adjudged and decreed by the court that as to the plaintiff herein and the defendant W. H. Kilgore the above entitled action be and the same is hereby dismissed, and that the costs of this action to wit: $79.95 be taxed equally to said plaintiff and defendant W. H. Kilgore. To which the plaintiff and defendant Kilgore each duly except and are allowed forty days from the rising

of the court in which to prepare and present to opposing counsel their bill of exceptions.

26 And thereafter, on the 29th day of June, 1899, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, the appeal bond of W. H. Kilgore in the above entitled cause said appeal bond being in the words and figures following:

In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE S. WHITAKER and W. H. KILGORE, Defendant-.

Supersedeas Bond.

Know all men by these presents: That we, W. H. Kilgore, as principal and Peter McBride as sureties are held and firmly bound unto George S. Whitaker in the penal sum of $100.00 for the payment of which well and truly to be made we hereby bind ourselves.

Dated June 28, 1899.

Whereas on the 13th day of June, 1899, a decree was rendered in the district court in favor of defendant Whitaker and against the plaintiff and the defendant for costs and dismissing plaintiff's action in an action pending therein wherein Thomas McBride was plaintiff and George S. Whitaker and W. H. Kilgore were defendants and said W. H. Kilgore intends to appeal said cause to the supreme court, and whereas said district court has prescribed the sum of $100.00 as the amount of bond to obtain a review of said judgment and proceedings in the supreme court

Now therefore the condition of this obligation is such that if said W. H. Kilgore shall prosecute said appeal without delay and will not during the pendency of said appeal commit or suffer to be committed any waste upon the real estate in controversy and will pay the costs of appeal in the supreme court, then this obligation to be null and void, otherwise of, and to be and remain in full force and effect.

W. H. KILGORE.
PETER MCBRIDE.

The above undertaking and the sureties thereon approved by me this 29th day of June, 1899.

PETER O'BRIEN,
Clerk District Court,
By LEILLA SHAFTO, *Deputy.*

27 And on the 29th day of June, 1899, there was filed in the office of the clerk of the district court of Buffalo county, Nebraska, the appeal bond of plaintiff in the above entitled cause, said appeal bond being in the words and figures following:

District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE S. WHITAKER and W. H. KILGORE, Defendants.

Supersedeas Bond.

Know all men by these presents: that we, Thomas McBride as principal and Peter McBride as surety are held and firmly bound unto George S. Whitaker, in the penal sum of $100.00 for the payment of which well and truly to be made we bind ourselves.

Dated June 28, 1899.

Whereas on the 13th day of June, 1899 a decree was rendered in the district court of Buffalo county, Nebraska, in favor of George S. Whitaker and against the plaintiff and defendant Kilgore for costs and dismissing plaintiff's suit in an action pending therein wherein Thomas McBride was plaintiff and George S. Whitaker and William H. Kilgore *was* defendants and said Thomas McBride intends to appeal said cause to the supreme court and

Whereas said district court has prescribed the sum of $100.00 as the amount of the bond to obtain a review of said judgment and proceedings in the supreme court.

Now therefore the condition of this obligation is such that if said Thomas McBride shall prosecute said appeal without delay and will not during the pendency of such appeal commit or suffer to be committed any waste upon the real estate in controversy and will pay the costs of appeal in the supreme court then this obligation shall be null and void, otherwise of and to be and remain in full force and effect.

THOMAS McBRIDE.
PETER McBRIDE.

The above undertaking and sureties thereon approved by me this 29th day of June, 1899.

PETER O'BRIEN,
Clerk Dist. Court,
[SEAL.] By LEILLA SHAFTO, *Deputy.*

28 McBRIDE
vs.
WHITAKER ET AL.

STATE OF NEBRASKA, } ss:
Buffalo County, }

I, Peter O'Brien, clerk of the district court within and for the said county and State, do hereby certify the above and foregoing to be a true, full and correct transcript of the record in the above entitled cause as the same appears on file and of record in this office.

In testimony whereof, I have hereunto set my hand and attached the seal of said court at Kearney in said county and State this 18th day of August, A. D. 1899.

PETER O'BRIEN,
Clerk District Court of Buffalo County, Nebraska,
[SEAL.] By LEILLA SHAFTO, *Deputy.*

Revenue stamp 10 cts.

29 And on the same day there was filed in the office of the clerk of said supreme court a certain bill of exceptions in the words and figures following, to-wit:

30 In the District Court of Buffalo County, Nebraska.

THOMAS McBRIDE, Plaintiff,
vs.
GEO. S. WHITAKER, Def't. } Bill of Exceptions.

Appearances.

W. D. Oldham, attorney for McBride.
E. C. Calkins, attorney for intervenor Kilgore.
Fred A. Nye and Frank E. Beamen, attorneys for defendant.

Be it remembered that on the 15th day of February, 1899, that being one of the days of the regular February 1899 term of the district court of Buffalo county, Nebraska, the above entitled cause came on for hearing before the court, the Hon. Homer M. Sullivan, judge, presiding. That to maintain the issues joined, the said parties offered and introduced the following oral and documentary evidence, made their objections thereto, and took the exceptions to the rulings thereon as hereinafter fully set forth:

31 INDEX.

Plaintiff's witnesses.	Direct.	Cross.	Re-direct.	Re-cross.
Thomas McBride	3	8	13	14
C. B. Channel	16	19	27	28
Defendant's witnesses:				
W. H. Nutter	30	31	33	33
A. F. Gibson	35	36		
James Evans	38			
W. H. Nutter, recalled	41			
James Evans, recalled	42			
John Chism	43	45	46	47
C. B. Channel, recalled	49			
A. H. Swinyer	50	52		
H. J. Dugdale	54	55		
George Carson	56	57	58	
Plaintiff's rebuttal:				
Thomas McBride	59	60		
Defendant's rebuttal:				
C. B. Channel	61	63		
E. N. Porterfield	65	66		
Geo. S. Whitaker	74	74		

32 Counsel for plaintiff offers in evidence deed record for patents marked G of the records of Buffalo county, Nebraska, page 336, or so much thereof as shows the patent from the United States to the plaintiff Thomas McBride, of the land described in his petition.

Counsel for defendant Whitaker objects to the introduction of any testimony in this case for the reason: First, the petition does not state facts sufficient to constitute a cause of action; second, that he has an adequate remedy at law; third, that the court has no jurisdiction of the subject matter, it being a part of the domain of the United States and within the exclusive jurisdiction of the United States court and unsurveyed. Objections overruled. Defendant excepts.

Counsel for defendant Whitaker also objects to page 336 of record G for the reason that it is not the best evidence. Objection sustained and record G is ruled out. Plaintiff excepts.

Counsel for cross-petitioner Kilgore offers in evidence page 247 of deed record 47, being a deed from William Walker and wife to William H. Kilgore for lots 1, 2 and three in section 14; and lot 2 in section 13; and lot 7 in section 12, town 8 range 15, containing in all 168 and 90/100 acres more or less.

Defendant Whitaker objects as not the best evidence. Objection is overruled for the present. Defendant excepts. Same is read in evidence.

Plaintiff McBride admits that the cross-petitioner Kilgore is the owner of the land described in his cross-petition.

Counsel for cross-petitioner Kilgore offers in evidence page 305 of deed record 48, being a deed from Abram Rayborne to William H. Kilgore of lots 5, 6 and 7 in section 7 and lot 4 in section 8 in township 8 range 14; and lot 6 in section 12 township 8 range 15, being in all 167 acres, and dated the 14th day of September, 1889.

Defendant Whitaker objects as not the best evidence. Objection overruled for the present. Defendant excepts. Same is admitted and read in evidence.

33 THOMAS MCBRIDE, being called and sworn as a witness in his own behalf as plaintiff, testified as follows:

Examined by Mr. OLDHAM:

Q. You may state if you are the plaintiff?

A. Yes, sir.

Q. State if you are the patentee named in the patent from the United States to the land described in your petition?

A. Yes, sir.

Q. You may state to the court how long you have been in possession of the land described in your patent?

A. Why I filed on it—in the first place I entered it in the spring of 1878 and have been in possession ever since.

Q. You began living there then?

A. Yes, sir.

Q. For what purpose do you use the land?

A. Part of it is farming land and part hay land and pasture and part is ruff.

Q. Who owns the land north from you, or who is in possession of the land north of you?

A. Now?

Q. Yes, sir.

A. W. H. Kilgore.

Q. How long has Mr. Kilgore lived on this land north of you, about how long?

A. I think he has been in possession of that, I could'nt say exactly, I think seven or eight years.

Q. For what purpose does Mr. Kilgore occupy it?

A. He has got it fenced in and uses it for pasture.

Q. Now state to the court about this strip of land that is in dispute, where it lies with reference to your land and Kilgore's land?

A. In between the meander lines?

Q. Yes.

A. It joins lot 8 on the north side.

34 Q. Of your land?

A. Yes, sir, lot 8 of section 12 on the north side, that is the north boundary line of lot 8 section 12, and across on the other side, the south side, lot 7 in section 12 comes up to it. So it lies right between that and 8 in section 12.

Q. Who occupies lot 7 in section 12?

A. Kilgore occupies lot 7 in section 12.

Q. And lot 8 in section 12 is yours?

A. Yes, sir.

Q. Now with reference to lot 5 in section 13, how is that situated?

A. That comes up and borders on to it; lot 8 does not extend the full length of the quarter and then lot 5 comes in there and that borders on this supposed vacant strip between the two lines until it comes to the line that runs north and south that separates this quarter section.

Q. Examine the plat that I now hand you marked Exhibit "A" and show the court on that plat where your land lies and where Kilgore's land lies and where the land in dispute lies?

A. The section or lots are not marked on this.

Counsel for defendant Whitaker objects to the witness using the map for the reason he doesn't seem to understand it. Objection overruled. Defendant excepts.

A. Yes, sir, I understand it now; this is lot 8 and this is lot 5 that comes up in here. (Indicating.)

Q. Laying west of lot 8?

A. Yes, sir right west; lot 5 is supposed to commence here in this 40 acre line or 80 rod line and running here to this line, and this cut off here makes this lot; the other side is full quarter.

Counsel for defendant Whitaker objects to the testimony as not intelligible, and also as incompetent for the reason there is no evidence here to show that it is a correct plat. Objection overruled. Defendant excepts.

35 A. This here (indicating) would be lot 5 and this 8, and there is the N. E. quarter of the N. E. quarter section 12, and lot 7 is in here. (Indicating on the plat.)

Q. Now show the court where the land in dispute is?

A. It is right between, or supposed to be as near as I can see, right in between those two red lines; that line is on the north side and this is on the south side; it runs right through there (indicating).

Q. Show the court where the Mosquito channel is?

A. On the original map it is marked right in here; on this there is no Mosquito channel marked on this.

Q. Show the court where the Mosquito channel runs with reference to your lots?

A. It has always been known as the Mosquito channel, the whole of it, all those channels, none of them in particular, because after

you get by these supposed islands it widens out west and east; it is filled up now.

Q. Now tell the court when this defendant Whitaker begun laying claim to the land, and whether you had been in possession of the land when he laid claim to it?

Counsel for defendant Whitaker objects as leading. Objection overruled. Defendant excepts.

A. Why it was in April he came in there, the first time I saw him was in April; that was two years ago last April I think, let me see now, two years ago next April; I can find out, because I have papers to that effect, but it was some time about that time, he came in there; I had a fence around there and he came and tore the fence down and took possession and of course he has held forcible possession ever since; and he tried to get homestead papers on it, and the Government——

Counsel for defendant Whitaker objects to what he did unless he knows.

By the COURT: You may tell if you know.

A. I know because I got a letter from Washington stating——

36 Counsel for defendant Whitaker objects to any letters as incompetent.

Q. You say you had a letter from Washington?

A. Yes sir.

Q. Where from?

A. From the Secretary of the Interior, General Land Office, Washington, D. C.

Q. Is that the one you got from the department, about Whitaker—Exhibit "B?"

A. Yes sir, that is it.

Q. Did the letter you received enclose anything to you?

A. Yes sir, it enclosed a copy of a letter.

Q. Now what did it enclose?

A. It enclosed a copy of a letter or the answer they sent to George S. Whitaker in regard to——

Counsel for defendant objects that there is no evidence here that shows it is a copy of any letter ever written.

(The letter referred to as being enclosed is marked Plaintiff's Exhibit "C" for identification.)

Q. Now this Exhibit "C" was enclosed in Exhibit "B" was it?

A. Yes sir.

Q. You got them at the same time?

A. Yes sir.

Q. Now you may state to the court what if any claims on the land in dispute have been made by your co-petitioner Kilgore?

A. Any claim?

Q. Yes, to the ownership of the land in dispute—that is what claims he has asserted to you?

Defendant Whitaker objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. He claimed to the center, between the two meander
37 lines which is supposed to be the channel or which was supposed to be the channel then.

Q. How long has he been asserting that claim?

Defendant Whitaker objects as incompetent, irrelevant and immaterial. Objection overruled. Defendants excepts.

A. He has asserted it to me for several years.

Q. Has he ever been on any part of the disputed land and exercised rights of ownership over it?

Def't Whitaker objects as incompetent, irrelevant & immaterial. Objection overruled. Def't excepts.

A. Yes sir, he had possession of most all of it for quite a number of years.

Q. What acts of ownership did he exercise over it?

A. He had it fenced and pastured it.

Q. What pretended acts of ownership has this defendant Whitaker been exercising over it?

A. So far as I know, and what he told me, just as a squatter's right.

Defendant Whitaker moves to strike out the answer of the witness as not responsive to the question. Motion overruled. Defendant excepts.

Q. Did the defendant Whitaker take possession?

A. Yes sir, he went in and took possession.

Q. What has been done on it, has he built anything on it?

A. He built a small house, 10 by 12 and a hay stable, and then run a single wire through and fenced me out, and left my fence around him.

Examined by Mr. CALKINS:

Q. You have lived there, how many years?

A. About twenty-one years.

Q. Now, who lived there before Mr. Kilgore?

A. You mean on that place right north of me?

Q. Yes.

38 A. The man that homesteaded that; one of them was named Rayburn, and the other was William Walker.

Q. What possession if any did they have of the land in dispute, before Kilgore came into possession?

A. Bill Walker homesteaded the land in there at the time he was working for Kilgore and they had a fence around the whole of it.

Q. How long ago is it since Walker had a fence around that?
A. I forget.
Q. Is it more than ten years?
A. Somewhere about that.
Q. Now I want to know what the previous owners did in taking possession of or in using the land in dispute?

Defendant Whitaker objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. They lived there, proved up, and just lived there.
Q. I see these deeds, one is dated '89, made to Kilgore; how long before Kilgore come there was the fence built?
A. Kilgore built the fence.
Q. After he came there to live?
A. Yes sir.

Cross-examination by Mr. BEAMEN:

Q. As I understand your testimony, this land that is in dispute has been in the possession of Kilgore part of the time and in your possession part of the time?
A. Yes sir.
Q. Did you and Kilgore have any trouble about the possession of it?
A. Not very much.
Q. Was Kilgore in possession of the whole of it, that is the land in dispute, a part of the time?
A. Yes sir, he had that fenced in, and not only that but part of mine at one time.
Q. And then you got possession of all the disputed tract?
39 A. Not all of it, part of it.
Q. How great a part of it?
A. Why about two thirds of it; and by mistake, I had my fence over on Kilgore's land.
Q. How did you get possession of it?
A. Well, by the county laying out a road supposed to be between Kilgore and me, and Kilgore moved his fence from my side over on the north side of the road, and I went and got wire and went and run a fence through on the south side, leaving four rods for the road; that is the way I came to get possession.
Q. What land was that road on?
A. A part of the road is on the disputed land and a part is on Kilgore's and I think a little on the east end of mine.
Q. Was any of it condemned for a road?
A. No sir, not that I know of. I wasn't aware of it if it was.
Q. Who was in possession at the time the road was laid out?
A. Mr. Kilgore.
Q. You have been there 21 years?
A. Yes sir.

Q. What was the condition of the ground there 21 years ago?
A. 21 years ago, I should say it was pretty wet.
Q. Pretty wet?
A. Yes sir, pretty tolerably wet.
Q. Those channels run now the same as they did 21 years ago, do they not?
A. I couldn't swear to that.
Q. Well, you wouldn't say they don't?
A. No sir, because I didn't measure them and therefore I don't know; I didn't measure where my north line was either.
Q. Well didn't they approximately run the same, so far as anything you observed, or so far as you seen or noticed?
A. I think some of them are, and i think some of them might have changed a little in some places; the Platte river is liable to change.
Q. Has any of them changed to any considerable extent?
A. I think they have.
Q. Whereabouts have the changes taken place?
A. I couldn't say.
Q. Has there been any changes to any considerable extent along this land of section 12, any of the Mosquito channels?
A. I would say that it is dryer now than then.
Q. But the course of the channels are the same as they were 21 years ago in section 12?
A. Well I couldn't say.
Q. Well, you couldn't say that they had changed, could you?
A. I couldn't say, only I say they have changed some.
Q. I will ask you if you did't attempt to file, or did file on some of the islands outside of what you claim to be your line?
A. I tried to.
Q. And did you file?
A. Yes sir.
Q. And your filing was cancelled was it not?
A. Why certainly.
Q. For what reason did they cancel it?
A. Because it was not homestead land.
Q. Was any of the land you filed on and which was afterwards refused a part of the land in dispute?
A. Well I have a letter here. (Witness produces a letter.)
Q. Was this the only letter you got?
A. That is one of them.
Q. This is a letter from the Grand Island office; did you get any from the department at Washington?
A. Not at that time.
Q. Have you got with you the letter that you got from the department at Washington?
A. I have got more than one.
Q. I mean, have you got with you the letter that you received from the department with reference to this cancellation?

40*a* A. No sir.

Q. Isn't it a fact that they cancelled your entry there for the reason you couldn't cross the channel?

A. No sir.

Q. Where is the letter you got from the department?

A. You have got it.

Q. I mean from the department at Washington?

A. I didn't get any.

Q. Is this the letter you got?

A. That is the only letter I got in regard to that filing.

By Mr. OLDHAM:

Q. You say this letter (Exhibit B) is the letter you got?

A. Yes sir.

Plaintiff offers in evidence the letter marked Exhibit "B."

Defendant Whitaker objects as incompetent irrelevant and immaterial.

By the COURT:

Q. You never appealed from this decision of the Grand Island office did you?

A. No sir, not at that time.

Q. Did you ever appeal at all?

A. I wrote there afterwards.

Q. Wrote where?

A. To the Secretary of the Interior, Land Department, Washington, D. C.

Q. Did he answer you?

A. Yes sir.

Q. Where is the answer?

A. I couldn't say whether I have got it or not.

By Mr. CALKINS:

Q. Was it in regard to this entry?

40*b* A. No sir.

By the COURT:

Q. What is this letter referred to by counsel?

A. He wanted to know if I appealed to the Secretary of the Interior about the land, and I said I did not exactly appeal, I wrote to the Secretary and told him of the decision of the officials at Grand Island, and they gave me about the same idea as they did at Grand Island, that I couldn't homestead it; I don't know whether I have got the letter or not.

By Mr. OLDHAM:

Q. Is this Exhibit "D" one of the letters that you got at that time?

A. Yes sir, this is one I got about that time.

By Mr. BEAMEN:

Q. Now these channels along here which is below the red line that you testified to, runs through lot 8, does it not? (Showing witness Exhibit "A.")

A. That much of lot 8.

Q. That was there 21 years ago wasn't it?

A. Why yes, there was a channel running through there 21 years ago.

Q. Just the same as that is now?

A. It might have worked one way or the other.

Q. But not very much?

A. Not very much.

Q. Now you are familiar with this between these red lines; there is no channel there?

A. There is a bed of an old channel, it is filled up now; there is an impression there, there was one through there at one time.

Q. Did you ever see one?

A. I have seen the whole thing under water.

40c Q. You mean in times of high water?

A. Yes sir.

Q. There is never any water in between the red lines in the ordinary stages of the river?

A. No sir.

Q. There are trees in there?

A. No sir, not now.

Q. There has been?

A. Brush and small trees all through this side and that side.

By Mr. OLDHAM:

Q. At the time you made the filing on the part of the land now in dispute of which you testified in answer to a question from the counsel for the defendant, had you then filed on the land that you now owned and is described in the petition?

A. Yes sir.

Q. Had you completed your title to that land?

A. Yes sir, proved up and got the patent.

By the COURT:

Q. And made this application for preemption?

A. For additional homestead; that island was marked on the map.

By Mr. OLDHAM:

Q. When you received the letter marked Plaintiff's Exhibit "B" you didn't make any further claim of entry on it?

A. No sir; I tell you, I went down to Grand Island and made that entry and left there and he said he would send my receipt, but he inquired into it and looked it over, and then about a week afterwards I got returns and my money back except the filing fee.

Q. And that came back with his letter here that has been introduced in evidence as Exhibit "B"?

A. Yes sir.

40*d* Q. Now I believe you testified in answer to a question of defendant's counsel that you had seen this island or land in dispute years ago when it was wet?

A. Yes sir.

Q. Now I will ask you if, as a matter of fact, say twenty years ago, if the river was higher on an average than it is now?

A. Yes sir, I think it was.

Q. And much submerged land in the river?

A. Yes sir, that is a fact.

By Mr. BEAMAN:

Q. You are just as positive that there was a channel through there where the red lines are, as you are to anything you testified to?

A. I hav-n't testified there was a channel where the red lines were.

Q. I understand you so; didn't you so testify?

A. You ask me on that map, if there was a channel running through lot 8 and I says yes.

Q. And I also asked you the kind of land between the red lines, whether it was high or low land, or whether there was a channel and what was the character of the land?

A. When?

Q. Well I will ask you now.

A. Well it is pasture land.

Q. Well twenty years ago?

A. Twenty years ago it was principally brush and grass.

Q. Has there been a time in the last twenty-one years that there has been a channel between those two red lines?

A. Not running all the way.

Q. Has there ever been a time when there was a channel a part of the way between those red lines?

A. I could not say exactly because those red lines are on the map and not on the ground.

Q. What are they supposed to represent on the map?

40*f* A. The surveyor put them there to represent the meander lines.

Q. Well you know approximately where they are on the ground?

A. No sir only where the surveyor left a mark, and Whitaker run a fence through a part of the way.

Q. Were you ever with the surveyor when he retraced that line?

A. No not on my side.

Q. Did you ever see him or any surveyor retrace those meander lines?

A. You mean survey them twice?

Q. Well locate them?

A. I seen several surveyors in there two or three different times running out lines, and I was with him one time when he run out a

line on the south line of lot 7 in section 12; I was with him at that time.

Q. Was that a meander line?

A. Yes sir that was a meander line.

Q. How many streams of water or channels did it cross?

A. I think he crossed two.

Q. Didn't it cross the third one at the east end?

A. He stopped there, whether the original line went across I do not know.

Q. Now what I have been trying to ask you was, whether or not there has ever been a channel to your knowledge between these meander lines?

A. Why I couldn't say.

Q. Then you didn't mean to be understood as testifying that there was one there?

A. No sir I didn't say there was.

Q. Well I will ask you if you know how many channels the south meander line crosses?

A. It crosses one and then right at the road there, there is one there; it is not a channel now, but supposed to be one at one time; it crosses that.

Q. The road runs north and south?

40*g* A. Yes sir on the east side of section 12, north and south.

Witness excused.

C. B. CHANNEL, being called and sworn as a witness in behalf of the plaintiff, testified as follows:

Examined by Mr. OLDHAM:

Q. You may state to the court what official position you occupy?

A. I am county surveyor at present.

Q. How long have you resided in the county?

A. About nine years.

Q. What business have you been engaged in, what is your professional business?

A. Civil engineer and surveyor.

Q. Have you been county surveyor before?

A. Yes sir I served one term.

Q. And have you ever been city surveyor?

A. Yes sir one term and part of another.

Q. I will ask you if you have ever served as Government surveyor?

A. I was deputy United States surveyor at one time.

Q. Now are you, in your capacity as a surveyor, acquainted with this land in dispute in this case?

A. Yes sir, I made a number of surveys down in that part of the county.

Q. Tell the court for what purpose you made those surveys?

A. I think the first survey I made down there was after Mr. Whitaker—I am not sure whether it was or not—but at any rate some one applied to the United States Land Office to have this island surveyed and opened for settlement, and the Land Commissioner appointed me deputy to make the survey; and I went on the ground, and in order to determine whether my survey would correspond with the Government survey I retraced the meander lines, and I found on the lines crossing the island in question I
40h found I would not be able to meander the channel without having my survey conflict with the Government survey, and I so report to the department, and they revoked the order for the survey at that time.

Q. Now you are acquainted with the land on which this defendant Whitaker is located?

A. Yes sir I have been over it several times.

Q. I will ask you to state to the court if you are acquainted with the plat you hold in your hand (Exhibit "A")?

A. Yes sir.

Q. Who made it?

A. I did.

Q. When?

A. In 1897 it is marked, I suppose that is the time.

Q. How did you come to make the plat?

A. Why it appears from the marks upon the plat that it was made for Mr. McBride, I suppose I made it at his request to show the lines.

Q. Now explain to the court what the red lines indicate and the numbers of the lots and sections?

A. Those red lines running northeast and southwest represent the original Government meanders as I traced them out.

Q. What do the black lines indicate?

A. Those black lines, the crooked black lines, represent the channels as I found them when I made the survey. And I might state in this connection as I remember it on the original plat or Government plat this channel ran along where the meander line is, or the channel on the north would be south of the meander line and that on the south side would be north of the meander line.

By the COURT:

Q. Now when was this Government survey made?

A. I don't remember, I think it must have been about '76, or near that time.

Q. And you traced what you believe to be the meander line—when?

A. This was in 1897, when the map was made; I retraced them under my appointment as deputy U. S. surveyor in '95.

40i By Mr. OLDHAM:

Q. Now when you say you retraced the meander line of the

original Government survey what did you take with you, and what information did you have to aid you?

A. I had a copy of the original field notes that was sent to me by the Commissioner General of the Land Office, and I also had access to the county records including the plat book and written notes of the surveyor.

Q. And with that assistance you retraced the meander lines?

A. Yes sir.

Q. Now when you retraced the lines in '95 did you find any difference between that and the meander line you retraced in '97 on this plat?

A. No, I don't think there was any material difference.

Q. You made a comparison did you not? Between your survey in '95 and the survey of '97 that you made?

A. Yes sir I did.

By the COURT:

Q. I don't understand this. Where is lot 8?

A. It is this one in the southeast corner; this represents only a quarter section.

Q. These four squares?

A. Yes sir.

By Mr. CALKINS:

Q. I understand that this Exhibit "A" is a correct plat of your survey made from actual measurement made on the ground?

A. Yes sir.

Q. Using your data the Government field notes and plat?

A. Yes sir.

Q. And that the red lines indicate the meander lines of these channels when run according to the Government field notes?

A. Yes sir.

Q. And that the irregular black lines indicate the channels as you found them at the time of your surveys?

40j A. Yes sir.

Q. And the dotted lines indicate the boundaries of the lots?

A. Yes sir.

Counsel for plaintiff offers in evidence Exhibit "A," being the plat. No objection same is admitted in evidence.

Cross-examination by Mr. BEAMAN:

Q. Did you make two surveys?

A. I think I made a survey in '95, a preliminary survey, I just ran out the lines, and I think I made another one later. The first survey I made included other islands besides this one in section 12.

Q. Did you locate the corners of section 12 when you made your survey?

A. Well not all of them. There was two of them on the north side of the river; I used the southwest corner and located the position of the southeast corner.

Q. You located the southwest corner?

A. I ran from that, it was already there.

Q. Then you started your survey from the southwest corner of section 12?

A. Yes sir to establish the meander line I had to re-run them.

By the COURT:

Q. This plat just shows the southeast quarter of 12, does it not?

A. It shows the southeast quarter of 12 and the south half of 7.

By Mr. BEAMAN:

Q. You say you found the southwest corner of the section without any difficulty?

A. Yes sir.

Q. And started there and surveyed east the number of chains the field notes called for and found the quarter section corner?

A. Yes sir.

40½ Q. And you surveyed the number of links called for and come to the meander stake?

A. Yes sir.

Q. And then you took the measurement to—where was the next point?

A. The next point would be the second meander line.

Q. Wasn't the next point on the island between the meander lines?

A. Well I think there was a small island mentioned in the field notes, I think they give the distance to the island and the distance across the island.

Q. And the next distance you run would be the distance from the southwest corner to the other meander corner on the south line of the section?

A. I believe so.

Q. Then when you retraced the meander lines did you start with the meander corner on the south line of the section or did you start from the other meander corner?

A. I think I started with the meander corner on the east side of the section.

Q. How did you locate it?

A. I run from the southeast corner of the section north.

Q. How did you locate the east line of the section?

A. From the quarter section corner on the east side of the section and from the location of the southeast corner of section 12 I wish to state, at the time this survey was made there was no well defined corner there, though the point was located from measuring a mile east and a mile west and that point was located, but there was no corner established at the time.

Q. Which corner do you refer to?
A. Southeast corner of 12.
Q. You started from corners a mile from that?
A. Yes sir.
Q. Did you find a corner a mile east of section 12?
A. My recollection is the corner there is quite distinct.
40½ Q. And I understand you to say you also located the quarter section corner on the east side of 12?
A. Yes sir.
Q. What did you find there?
A. *A.* A stake.
Q. What was it?
A. An iron pin.
Q. Was it a piece of gas pipe?
A. I rather think it was.
Q. How are the quarter sections indicated?
A. By a stake and mound.

By the COURT:

Q. What quarter section corner was where the gas pipe was?
A. There it is. (Indicating on Exhibit "A.")

By Mr. BEAMAN:

Q. The one on the east line of section 12?
A. Yes sir.
Q. I will ask you what the Government surveyors used to mark the quarter section corners with?
A. A stake, two pits and a mound I think.
Q. Did they use charcoal in any of the corners?
A. I think they claim to deposit lime stone.
Q. Did you find any deposits of limestone there?
A. No sir.
Q. Did you first locate those points on the section line of section 12?
A. Yes sir.
Q. And you located then the meander corners on the east line of section 12?
A. Yes sir.
Q. Where were those meander corners located on the east line of section 12 with reference to the channels or streams?
41 A. Well according to this plat I have here the north meander corner is located on the north bank of the north channel of the Mosquito channel; that channel was divided there.
Q. And where was the south meander corner?
A. It is located apparently, from the map, south of the second channel.
Q. That is on the south bank of the second channel?
A. Well between that and the third channel; as I remember it, it was not close on the bank.

Q. Do you remember how far from the bank?
A. No.
Q. Was it very far or close to the bank?
A. I don't think it so very far, though it wasn't on the bank.
Q. A few feet?
A. I think more than that perhaps.
Q. Then you placed your instrument at the meander corner on the east line of section 12, and took the direction that was indicated in the field notes for the direction of your meander line, did you?
A. Yes sir.
Q. And ran the number of chains and number of links as indicated in the field notes?
A. Yes sir.
Q. And you followed that meander line across section 12?
A. Yes sir.
Q. Did that bring you out at the meander stake on the south line of section 12?
A. Very close to it.
Q. That is it brought you out to the west of the two meander stakes on the south side of section 12?
A. Yes sir, the west stake.

By the COURT:

Q. Did you find the meander stake there on the south line of section 12?
42 A. No I don't think I did.

By Mr. BEAMAN:

Q. You mean, in tracing that meander line across there you came out approximately where the meander stake would be if it had been placed there, do you?
A. Yes sir, where it was called for in the field notes.
Q. Do you know as a matter of fact whether the Government surveyor placed any stakes at meander corners?
A. The field notes show they did.
Q. Did you ever find any?
A. Yes sir, east of section 7 and the south bank of the south channel of Mosquito channel I found distinct mounds and stakes there.
Q. How did you locate or trace the south meander line in section twelve?
A. I located it by the meander corner on the east side and ran a meander line across the section.
Q. Did that bring you out approximately near the place where the field notes indicated the other meander stake would be located on the south side of section 12?
A. I think so.
Q. And you didn't find any stake there?
A. No that had been pastured through there.

Q. Were those meander stakes or the places where you expected to find them according to the field notes, were they on the banks of channels or streams?

A. The ones I found?

Q. Those at the termination of the meander line; in other words where the meander line come to the south line of section 12, what was the character of the land there with reference to channels?

A. Where the north meander line intersected the south line of the section there was no channel.

Q. How far was it from the banks of the channel?

A. I don't remember, I think probably several chains.

43 Q. How was it with reference to the meander stake on the south line there, was it on the bank of a channel or near it?

A. As I remember it that was close to the channel.

Q. Now I will ask you as a matter of fact, how many channels you crossed in running that north meander line?

A. Two I believe.

Q. How many did you cross in running the south meander line?

A. Two I think.

Q. What was the character of the land between the meander lines?

A. The land was probably from two to three feet higher than the bed of the small channels through there, and was covered with brush and grass.

Q. You never saw the land before you went down to survey it?

A. I don't remember—yes I think I did. I surveyed Park island some time before that and of course would see the land then.

Q. Now if a meander line running from the east meander stake on the south line of section 12 had followed the bank of the channel, it would have come out several rods lower on the east line, would it not?

A. Several rods further south, yes.

Q. And if the north meander line, starting from the east line of the section and running west had followed the bank of the channel, it would have come out much farther west on the south line?

A. If it followed the bank of the second channel coming down from the north it would yes; if you followed the first channel, I don't know where it comes out.

Q. Where does it start, at the second or first?

A. North of the first.

Q. You didn't trace out that channel on the map?

A. No sir, not fully.

Q. Do you know approximately where it run?

A. Yes sir.

Q. There is another channel running off here (indicating) isn't there?

A. Yes sir.

44 Q. It isn't shown on this map?

A. No sir.

Q. Now I will ask you if, in your opinion, the Government surveyor ever actually surveyed those meander lines?

Counsel for plaintiff objects as immaterial. Objection overruled. Plaintiff and cross-petitioner Kilgore excepts.

A. Well I don't know that I really have an opinion on that subject; they could have established those lines or calculated them in the office and put them on the plat without running them on the ground, but whether they did that or not I don't know.

Q. Do you know anything about the methods of the Government surveyor in locating meander lines?

A. Well I think usually they ran them out in the field.

Q. Well now doesn't the conditions that you found down there rather indicate that the Government surveyor located some meander corners on the section lines of section 12, and then traced those lines in the office, assuming that the two south lines were on the same side of the same channel, when as a matter of fact they were located on the banks of different channels?

A. It is possible they did so.

Q. Wouldn't the indications show there that to be the fact?

A. Well they might have run them on the ground, I don't know.

Q. If they run those lines on the ground and the ground was the same then as it is now, they must have crossed some channels, did they not?

A. Yes sir.

Q. And the channels they crossed in running those lines are now distinct channels are they not?

A. Yes sir.

Q. A surveyor understands a meander line to be a line along a bank of a river, does he not?

A. Yes sir.

45 Q. A surveyor never runs a meander line across a channel or river does he?

A. It is not a usual thing to cross a channel unless it is a small channel, not large enough to be considered.

Q. Did you ever compute the amount of land there was in those different lots described there?

A. Do you mean the total amount?

Q. No the amount in each lot?

A. Do you mean to compute it from the field notes?

Q. Yes?

A. No, I never did.

Q. Did you ever compute the amount in the island as bounded by the present channel?

A. I think I did at one time.

Q. Do you remember what that was?

A. No, I can't say I do.

By the COURT: Your plat indicates it contains more than 27 acres?

A. That was taken from the Government plat; they made a survey of the section and run their meander line and used the meander line as the boundary of the lots and they computed the area of the lots.

By Mr. BEAMEN:

Q. And that is taken from the Government plat book?
A. Yes sir.

By the COURT:

Q. Assuming that the boundary line fixed by you is a true one, do you know how many acres there is in lot 7?
—. Well I think practically as shown on the Government plat; in other words that lot 7 would have to extend down to the red line to show the number of acres on the plat.

46 By Mr. BEAMAN:

Q. Did you compute the land in that island?
A. Yes sir.
Q. Do you remember the amount?
A. No sir.
—. Will you compute it now?
A. I couldn't do it, I don't believe I have sufficient data.
Q. Those channels there that the meander lines cross, are they distinct?
A. Yes sir.
Q. Did you see anything about the land between these meander lines that would indicate the existence of an old channel?
A. That is a question that is not easy to answer for the reason the meander lines extend so far they strike a channel that is distinct.
Q. Well in section 12?
A. Well even in section 12 this map shows there is a channel at a certain point.
Q. What I meant by my question was, on this land which is now between the channels, did you find any indication of an old channel?
A. No I don't remember of any.

By Mr. OLDHAM:

Q. Examine this record I now hand you and tell the court what record it is?
A. This is a certified copy of the plat of the survey made by the Government.
Q. What tract of land is it, or what section is it?
A. Well this page I am referring to now includes township 8 range 15.
Q. Section 12 of that township is included in there, is it?
A. Yes sir.

Q. And lot 5 of section 13?
A. Yes sir, all of section 13.
Q. Is this the record of the original Government survey?
47 A. This is the plat.
Q. How was it made?
A. Well the field notes are taken and written out in full and usually a sketch made at the time of the survey, and this plat is made out in the office afterwards by the draughtsman in the surveyor general's office.
Q. And how does the plat get here?
A. Well the United States Government have the original of all the plats and then the Commissioner of the General Land Office would have a copy of the plat and a copy is furnished to this county.
Q. That is certified to by the surveyor general?
A. Yes sir.
Q. Are these plats filed in all the counties of the State?
A. I don't think all the counties have plats now, they can get them at the Commissioner's office but they have to pay for them.
Q. That is the rule by which they are furnished?
A. Yes sir.
Q. Was it from information contained in the plat here that you traced the meander line?
A. My first tracing of them was from a copy of the field notes sent me from the Commissioner General of the Land Office, but it was practically the same as this, I couldn't find any difference so far as the measurements are concerned. As Exhibit "E" not here.

Counsel for plaintiff offers in evidence the Government plat relating to town 8 range 15.
Defendant Whitaker objects for the reason that it is not a correct survey. Objection overruled. Defendant excepts.

By Mr. BEAMAN:

Q. The data you used in making your survey was not the data that is on that page before you?
A. When I made my survey, I don't think I referred to this page.
Q. Did you ever compare the data you had which you received from the Commissioner with the original field notes that
48 you had in your possession as county surveyor?
A. Yes sir, I compared part of them.
Q. Did you ever compare those measurements with the measurements on the margin of that plat?
A. I don't know that I did.

Witness excused.
Counsel for plaintiff now offers in evidence Plaintiff's Exhibit "D" being the letter from the Department of Interior heretofore identified.

Defendant Whitaker objects as incompetent irrelevant and immaterial. Objection sustained. Plaintiff excepts.

Plaintiff and cross-petitioner Kilgore rests.

49 Counsel for defendant now moves to dismiss this case for the reason the proof does not show the plaintiff or cross-petitioner are entitled to recover and for the further reason the court has no jurisdiction over the subject matter of the action. Motion overruled. Defendant excepts.

Mr. W. H. NUTTER, being called and sworn in behalf of the defendant testified as follows:

Questioned by Mr. NYE:

Q. Where do you live Mr. Nutter?

A. I live a mile east of Gibbon and a half a mile north.

Q. How long have you lived in this county?

A. Well I don't know 22 or 23 years.

Q. Did you at any time live on what is known as the Kilgore island?

A. I have, on Drover's island.

Q. When did you live there?

A. I lived there, off and on, for the last 18 or 19 years.

Q. Were you familiar with section 12, township 8 range 15 during the time you lived there?

A. Somewhat.

Q. How near to that section did you live?

—. Well, I put up hay on section 12; and I camped there and moved up and down the island.

Q. At what time?

A. I commenced haying there in '87.

Q. Were you familiar with that section prior to that time?

A. Nothing more than as I drive across the country there to see different neighbors down there.

Q. How early did you commence to make those trips?

A. Well about '81 I think.

Q. You are familiar, are you, with the channels that cross section twelve?

A. Yes sir.

50 Q. When did you first become familiar with their location?

A. About 1881.

Q. What would you say from your acquaintance with them, whether or not they have changed their course if any?

A. I couldn't say they had changed any only they grew narrower than they used to be, and the willows have gradually closed them up.

Q. But the channels have kept their course have they?

A. Yes sir.

Q. Are you familiar with the lay of the land in lots 7 and 8 in section 12, that is in the southeast quarter? Examine this plat Exhibit "A," are you familiar with the land that lies between these red lines?

A. No, I know nothing about the red lines.

Q. What would you say was the character of the land between those channels in '80 and '81?

A. Well, it was very brushy, some was quite large, people used to go in there and cut wood.

Q. What sized trees were growing on the island at that time?

—. Well willows I should judge from the size of my arm up to thick as a stovepipe I should judge and from that down to little brush.

Q. You have seen these channels recently have you?

A. Yes sir, that is along the line, I haven't traveled any only along the lines. Well I went up along the channels 5 or 6 years ago.

Q. What would you say as to whether or not the channels had changed their course the last time you went up there from the time you first saw them?

A. I can't say they have changed a particle.

Cross-examination by Mr. CALKINS:

Q. You live one mile east of Gibbon, do you?

A. Yes sir.

Q. How far from this land?

A. About twelve miles.

Q. How long have you lived where you now live?

51 A. Well, I make that my home, but I lived on the island about three months this summer.

Q. Have you a house on the island?

A. Yes sir.

Q. And come up there to hay?

A. I have leased my meadow there now; but I have some farm land there.

Q. But your home is down by Gibbon, but you come there occasionally and stay?

A. Yes sir, I make my home at Gibbon.

Q. Now is it not a fact of late years and at times for the past ten years that the water has been much lower in the Platte river than it was the preceeding ten years?

A. Yes sir.

Q. Much less high water in June and July?

A. Yes sir.

—. And much land which was very wet 15 or 20 years ago have become comparatively dry?

A. Well, there was some channels, when *then* there was high winds

from the south, it would drive the water north and the north bank would have more than they would carry.

Q. Well the water was higher then than it is now-a days?

A. Yes sir.

Q. And when the water recedes the tendency is for willows to spring up channels to narrow down?

A. Yes sir.

Q. That has been going on for the past several years, has it not?

A. Yes sir.

Q. Is this above or below the bridge?

A. This section 12?

Q. Yes.

A. It is below the B & M bridge.

Q. Hav-n't they shut up quite a number of channels?

52 A. I understand they graded that Mosquito channel full: I have never been up there?

Q. For some years back, hav-n't they been doing that?

A. That I can't say.

By Mr. NYE:

Q. Do you know when the B. & M. dam-ed up any channels?

A. Two years ago.

Q. You say there is not as much water in the channels as there used to be. Has any channels changed their course?

A. No sir, they remain just as they were so far as I can see for the simple reason the willows hold all they get and the channels get smaller.

By Mr. OLDHAM:

Q. You have known them since '87?

A. Since '87 I commenced putting up hay there. Of course I rode back and forth before that.

Q. But you have been particularly acquainted with them since '87?

A. Yes sir.

Q. Do you remember when the Government survey was made?

A. I think it was somewhere along about '76 or '77.

Q. But you were not particularly acquainted or had any particular knowledge of this section 12 in town 15 in '76 or '77?

A. No.

Q. You had no particular acquaintance with it then?

A. Nothing more than I used to ride up with Mr. Dugdale. His father kept some cattle and we used to ride up there and herd while the old gentleman went home on Sunday—that was back in '74 or '75.

Q. That was when this land was reservation land?

A. Yes sir, before any settlers were on there at all. The only recollection I have, John was thinking of getting a claim down there

and we rode all over the island and looked around and we decided to not take it, and he was under age at that time.

53 Q. What time was that?

A. About '74 or '75. They were squatting on there then, and he thought of squatting on a piece and by the time it came into market he could take it.

By the COURT: What seasons of the year was the water highest?

A. We always calculated about June.

Q. Now tell me how wide this channel got?

A. Well it would overflow part of that Drover's island, the low parts.

Q. How would it compare in width with its present width, say in June of last year?

A. O it was higher.

Q. Four or five times as wide?

A. Well of course you could see where the main channel was, it would flow through willows and grass.

Q. Overflow the willows?

A. Yes sir, the current was not very swift there was hardly any current out where the willows and grass was, the water just lay there, of course there was a current.

By Mr. NYE:

Q. What has been considered among the settlers down there as to whether or not these channels were boundary lines or not?

Counsel for plaintiff objects as incompetent. Objection overruled. Plaintiff excepts.

A. I always understood that my land stopped at the water's edge, that was my understandsng when I homesteaded; they told me that anyway. They told me I couldn't cross any channels.

Witness excused.

54 Mr. A. F. GIBSON, being called and sworn as a witness in behalf of the defendant testified as follows:

Examined by Mr. NYE:

Q. How long have you lived in Buffalo county?

A. Since '71, 27 years last April I believe.

Q. At what period did you live down on this island in dispute?

A. Well I didn't live on it. I lived on Kilgore island.

Q. What date?

—. I couldn't give the exact date it was in September '73, near the middle of the month.

Q. Were you at that time or did you become familiar with the land in section 12, which is the section where Kilgore's land is?

A. There is no section 12. I couldn't have got section 12 if I had wanted to know.

Q. Well, did you become familiar with the land in the vicinity of the island?

A. Yes, I traveled all over it during the winter of '73, 4 and '75.

Q. You became familiar with the location of the various channels?

A. Well yes, more so than with the land.

Q. And you have been down there in recent years, have you not?

A. Well just to travel back and forth. I have been up to Fort Farm island across by the bridge and down to Nutter's island, hardly so late to these.

Q. What would you say as to wether the channels of the Kilgore islands have changed since the time you first become acquainted with them and the last time you saw them?

A. I wouldn't think they had changed, except that they were not as wide as they were and filled up a little.

Q. The character of the land between the channels, what would you say as to that, was it all the same kind of islands?

A. I would think so. I hauled wood off the islands in '73, 4 and '75.

55 Q. Were those islands south of Kilgore's place?

A. Not exactly south. We were camped or lived northeast, in fact almost where Mr. Nutter's house is on the island, a little further down. We had some cattle there and made barns and feed yards and hauled from those islands to make corrals.

Q. All the islands that appear down there now, at that date did they have vegetation and grass the same as now?

A. All the larger ones has. I would'nt theink there was much difference, perhaps not so much fine brush as then, there is not much larger timber, it is timber that has grown up since the railroad went through.

Cross-examined by Mr. OLDHAM:

Q. You first knew what you call Kilgore's island in '73 did you?

A. September '73.

Q. That was when it was reservation land?

A. Yes sir.

Q. What tract of land is it you call Kilgore's island? Which is the land in dispute, do you know?

A. No, I know there is three or four or two or three men in there on pieces of land but I don't know where.

Q. What I mean is, do you know the locality of the land?

A. I know the locality.

Q. But you do not know the particular piece of land in this suit?

A. I have been over it.

Q. You know where McBride's land is?

A. Yes sir.

Q. And you know this strip of land between Kilgore's and McBride's that this man Whitaker is now on?

A. Yes sir.

Q. Have you noticed it since Whitaker claimed it, have you got your mind on that particular piece of land?

A. As I said before I don't suppose I could go to his house.

56 Q. You hav-n't been down there to look at this particular tract?

A. No, they come to me yesterday in town and I didn't get home until after dark.

Q. Now, your general knowledge of the Kilgore island—what do you call the Kilgore island?

A. Where he lives, it is the one north of the channel.

Q. It is the one Kilgore now resides on?

A. Yes sir.

Q. Was he living there in '73?

A. Nobody but myself and another man lived there then.

Q. It was Government land then?

A. Yes sir.

Q. Now what would you say was the condition of the Platte river in '73, '74, '75, '76 and '77 in the month of June as compared with the condition of the river the last year or two, with reference to high water—that is, was there a greater or less flow of water in the Platte river then than now?

A. I wouldn't think there could be any comparison, that is it would be so much greater at that time; well I considered it a little risky to cross it.

Q. Then there was a much greater flow?

A. Yes; I don't know as I have been down there lately in the month of June, if I was I didn't pay any attention to it, but from what I know of the Platte there wouldn't be much water now; those years the banks were full.

Q. And it would flow over these little tracts or islands?

A. No, some of those larger islands I think are away up higher than some this side of it; this side Mr. Nutter has some land I know overflows.

Q. And these islands during June, 20 or 25 years ago would be frequently overflowed with the June rise of water, would they not?

A. No, you see there were low places and perhaps away at the head of the island it started in and run along and there might come high water on that; I made hay on that land in '74 and there

57 would be places in Mr. Nutter's island that he is plowing now where then water was standing on it.

Q. It would back up from the channels?

A. I don't know as you would call it backed up, it seemed to come up from the bottom, or else from away up above; it soaked up somewhere.

By Mr. NYE:

Q. Notwithstanding there was a good deal more water in the early period, would you say the channels have changed their course any?
A. I shouldn't think they had changed their course, not to amount to anything.
Q. The islands at that time were as distinct as they are at the present time?
A. The larger islands were.
Q. What would you say as between Kilgore's and McBride's?
A. Those larger islands I don't think have changed much.
Q. But the islands containing 20 or 30 acres?
A. Well sir, I shouldn't think they could change any unless to get a little larger or smaller.
Q. In other words, from your knowledge of the land down there it is practically the same then as now, except that there is not as much water in the channel?
A. Yes that is about all I can see.

Witness excused.

JAMES EVANS being called and sworn as a witness in behalf of the defendant, testified as follows:

Examined by Mr. BEAMAN:

Q. Where do you live?
A. I live a little west of Mr. Whitaker's there on Fort Farm island.
Q. You live west of the defendant do you?
A. Yes sir.
58 Q. Do you own some land down there?
A. Yes sir I claim to own some.
Q. What is the numbers of your land?
A. I think it is lots 3 and 4 and 7, lot 7 is in section 14 range 15.
Q. Your land then lies south of where Kilgore's land is?
A. South of the island that Mr. Whitaker lives on, part of it.
Q. How long have you lived down there?
A. Twenty-two years in May, I think.
Q. Were you there when the Government surveyors surveyed this land?
A. Yes sir.
Q. Did you see the Government surveyors survey any land down there?
A. I did; I got there probably a few days before they surveyed up through there, of course I came for a homestead and I wanted to see where my homestead would be, and I went and saw them establish one corner.
Q. Which corner was that?

A. Well it was section—no it was the half mile post between Thomas McBride and myself.

Q. That would be on the south line of section 12?

A. It would run through the center of section 12?

Q. It was a line running east and west was it?

A. Yes and one north and south.

Q. Well the one running east and west was the line right north of your land was it?

A. Yes sir.

Q. And that line crossed the island where Mr. Whitaker now resides?

A. Yes sir.

Q. Did you see them locate the half mile corner?

A. Yes sir.

Q. Is that located on that island or west of it?

A. It is on the island.

Q. Did you see them survey any meander lines there running northeast?

59 A. No sir.

Q. Did they survey any there?

A. They established that there corner, and started in a spring wagon west up towards the railroad and they took a sight from that corner west, and they didn't want to cross the big channel and they went up and crossed on the railroad; that is what they said, they said they were going up and cross on the railroad.

Q. Now then did you see them cross the channel a little ways east of the half mile corner?

A. Yes sir, they stopped there a while and waited for the surveyors to come up, or the chain carriers, and they come up and parleyed a while, it was quite deep then but the surveyor just plunged in and they followed him and they established a corner on that island.

Q. How deep was the water, five feet?

—. No, not five feet.

Q. How deep was it?

A. About waist deep.

Q. Did you see them locate any corner? or meander corner or drive any stakes on the bank of the channel?

A. No sir, I did not.

Q. Were the banks of the channel distinct?

A. Yes sir, then and yet.

Q. Has there been any change in the channels since then?

A. Been some little changes I suppose, not that you can see; it is filled up a little.

Q. The general directions are the same?

A. Yes sir.

Q. What kind of land is that between those channels?

A. Well some is little lower that the rest and some higher.

Q. What kind of land is that where Mr. Whitaker, the defendant's residence is?

A. That is the kind of land it is.

Q. Well is it high or low?

A. Well it is considered low.

60 Q. Low with reference to the other lands? Is it lower or higher?

A. A good deal of that is farmed there.

Q. Has it ever been any lower than the other land around there?

A. That is more than I can tell.

Q. Was there any timber on there or ever been any?

A. There has been some cotton wood or brush on there; I used to chop old cotton wood logs there.

Q. Was there any channel through that island where Whitaker's residence is when the survey was made?

A. The channel that was there started out from my barn and come out about the section line somewhere.

Q. That is the same channel that was there then?

A. Yes sir, and there was another fork by my barn and it run down and formed the island.

Q. And that was the same channel that is there now?

A. Yes sir.

Q. At the time of the survey, was there any channel that is now filled up, or was the land the same as now?

A. Good deal the same, only not as much brush on it. So far as I know there was no channel run through it.

Witness excused.

W. H. NUTTER being recalled in behalf of defendant, testified as follows on cross-examination.

Examined by Mr. NYE:

Q. You heard Mr. Channel refer to the gas pipe as a stake?

A. Yes sir.

Q. Do you know anything about it?

A. Yes sir.

Q. Tell what you know about it?

A. I drove it there myself; I drove it by guess, I knew it was in line this way (indicating) but didn't know whether it was the other way.

61 Q. Which direction do you mean?

A. I thought I was on the line running north and south.

Q. But you didn't know whether you were on the line running east and west?

A. No; the ground was perfectly smooth but there was a difference in the grass and I thought the corner was filled up; I first drove a wooden stake but afterward drove the gas pipe down.

Witness excused.

JAMES EVANS being recalled in behalf of defendants testified as follows:

Examined by Mr. BEAMAN:

Q. I will ask you if you filed on some of these islands after you had taken your homestead, as additional homestead?

A. No sir, I did not, I tried to; I was lacking somewhere between 16 and 17 acres of getting a quarter, and the way the lines run across there I concluded I could get some fractions to fill out the quarter, and I sent the money to Grand Island, or rather Ayers was county clerk and he sent it for me, and they sent the money back and told me I could not take it across the channel.

Q. They told you that you couldn't cross the channel?

A. Yes sir.

Q. So you regarded the channel as the boundary down there?

Plaintiff objects as incompetent, irrelevant and immaterial. Overruled. Plaintiff excepts.

A. We couldn't cross the channel and so I had to take 16 or 17 acres less than my quarter.

Q. Now, that land you tried to file on is the same island that Whitaker lives on?

A. Yes sir, the same one; Whitaker lives on it.

Counsel for plaintiff objects to the testimony of the witness
62 "they wouldn't let him file on it because it was across a channel" as incompetent, irrelevant and immaterial, and moves to strike it out.

Objection and motion overruled. Plaintiff excepts.

Witness excused.

Whereupon court adjourned until tomorrow morning.

February 16, 1899, court convened pursuant to adjournment.

Same parties present as yesterday.

JOHN M. CHISM being called and sworn as a witness in behalf of the defendant testified as follows:

Examined by Mr. BEAMAN.

Q. Where do you reside?

A. I live in the city of Kearney.

Q. How long have you resided in Kearney?

A. I have resided here about 15 years this last time.

Q. Were you here in the year '77?

A. Yes sir.

Q. What if any official position did you hold in that year?

A. Why I was a chainman.

Q. Did you help make the survey of what is known as the Indian reservation east of town here?

A. Yes sir.

Q. When was that survey made?
A. In the spring of '77.
Q. Did you help make the survey of section 12, town 8 range 15?
A. Yes sir.
Q. Do you remember the month that survey was made?
A. The range line was surveyed in April.
Q. In making these surveys what lines did you run with the chain?
A. Run all section lines and all lines around the islands.
Q. Did you run any meander lines with the chain?
A. No sir.
63 Q. When you say you ran lines around the islands, do you mean you fixed stakes and made field notes?
A. No sir.
Q. For what purpose did you run them?
A. To ascertain the number of acres in each island.
Q. Where did you run the line?
A. Around the outside within two feet of the shore.
Q. Did you make a plat of that?
A. I presume the surveyor made a plat of it after it was surveyed.
Q. Do you, in making the survey of section 12, do you remember about the channels that you crossed on the south side of section 12?
A. No I can't tell how many, it has been so long ago.
Q. When you crossed the channel did you fix any permanent stakes at the banks of the channel?
A. No sir, merely got the distance across the channel.
Q. Did you put any temporary stakes there?
A. Yes sir, we done that for the purpose of citing back on the compass so as to know where we were at.
Q. When you made the survey along the south bank of section 12, you didn't fix any permanent meander stakes, you say?
A. No sir.
Q. Well if the field notes of the surveyor show meander points for what purpose were they located?
—. That is something I couldn't tell, because I don't know.
Q. Did you run any lines between any points designated as meander points?
A. No sir.
Q. Do you know the land in controversy here—the island?
A. Yes sir.
Q. Have you seen it recently, within the last two years?
A. A year ago last summer I saw it.
Q. In your judgment is it the same as it was when the survey was made?
A. No sir.
64 Q. Any material changes?
A. Well, at that time it was swampy water standing in places, and covered with brush; we had to cut our way through

with an ax; now there is a road there and a bridge across the channel.

Q. Do the channels run the same as they did then?

A. I couldn't say as to that. I ain't positive; I think there is two channels of water running in there, but I think there was one dry channel.

Q. You didn't make the plat?

A. No sir.

Cross-examination by Mr. OLDHAM:

Q. When you speak about running a meander line, for what purpose did you run them?

A. Why as I understand it, we put those mounds on different points for the purpose of sighting back with the compass to see where we were at.

Q. What did you call those lines where you say you surveyed around the islands?

A. That would be meandering. We followed around the island to see how many acres there was; the islands that had twenty-one acres or less we didn't survey at all.

Q. You didn't run any meander lines unless there was a channel?

A. That is all, just around the outside of the channel.

By the COURT:

Q. How would you know whether there was 21 acres or not without measuring it?

A. Well, we could tell by looking at the island, there was a good many little towheads, and if we thought there was more than 21 acres we measured it.

65 By Mr. BEAMAN:

Q. In running around the island you didn't establish any permanent points anywhere?

A. No sir, we had a starting point and a point to come out at.

By Mr. OLDHAM:

Q. Now in the spring of '77, what was the condition of the Platte river as to the volume of water, as compared with the volume of water now?

A. When we commenced surveying there was considerable water.

Q. In '77 how did the average volume of water in the river compare with the volume now?

A. Much more water there then.

Q. And you say this land in dispute, at that time, was swampy?

A. Yes sir, water standing in places, and in some places it was almost impossible for a person to cross.

By Mr. BEAMAN:

Q. Do you remember as to the amount of water in the channels in the vicinity of the island in controversy?

A. There was a channel close to the island in dispute that was pretty deep; you see they vary those channels, and it may change; the wind changes the streams; if the wind is in the north the water is in the south part of the river.

Q. Was the island a distinct island as it is now? The one in dispute?

A. It surely must have been if it was surveyed; if it was surveyed it was a distinct island.

Q. Do you remember of running any meander lines in section 12 or surveying any island in section 12?

A. You mean outside of the section lines?

Q. Yes?

A. No sir we didn't survey any.

66 By Mr. OLDHAM:

Q. As I understand it, you didn't survey any island if you knew there was less than 21 acres in it?

A. Well we took all the islands of 21 acres or over; it was very easy to tell whether there was that amount of land in them or not.

Q. Well there wasn't that much land in this island in sight at that time, or you would have surveyed it, would you not?

A. Yes sir.

Q. You didn't survey any islands in section 12?

A. Yes sir.

Q. Did you survey this island in dispute?

A. Why if there was over 21 acres in it we certainly did.

Q. Do you remember of your own recollection whether you surveyed this island or not?

A. Well I wouldn't say as to that.

Q. Would it refresh your mind if you looked at the plat book?

A. Yes sir.

Q. Now look at Plaintiff's Exhibit "A," and do you now say you surveyed the island in dispute?

A. No sir.

Q. You did not survey it?

A. No sir.

Q. Now after examining the plat of the original survey would you say you surveyed the island?

A. No sir, we didn't survey it.

By Mr. BEAMAN:

Q. In running lines around islands to determine the amount of land did you ever cross channels?

A. No sir.

Q. Did you ever cross channels in laying any line except section lines?

A. No sir.

Q. Did you run any meander lines between what was designated as meander points?

67 A. No sir.

By Mr. CALKINS:

Q. Now you say you run lines where you didn't survey; you run lines along the banks in order to ascertain how many acres there were in the island?

A. Yes sir, around each island.

Q. Well you had to take the course and distance both, did you not?

A. No sir.

Q. Then how could you find the amount of land?

A. We didn't use any compass whatever, we just took a chain and chained around the island; our business was to find out the sections and the number of acres in each island.

Q. How could you find out if you didn't know the direction of these distances?

A. I presume the surveyor understood his business and knew how to figure it out.

Q. You are not a surveyor?

A. No sir.

Q. You were simply a chainman?

A. Yes sir.

Q. Who did the party consist of that you worked with?

A. John Mahon was flagman, Mr. W. W. Mannix built the mounds and Mr. Mather and myself were the chainmen.

Q. Who was the surveyor?

A. James Murphy; Simon helped us some on the survey.

Q. Now look at Exhibit "A" and look at these red lines on the east where these corners turn square, there must have been directions taken as well as distance wasn't there?

A. No sir, we used no compass, just the chain?

Q. Just went around and chained the distance?

A. Yes sir.

68 Q. But you didn't take any notes only the number of chains?

A. That is all.

Q. And you think the surveyor could make an estimate from that?

A. Yes sir, that was the way he done it.

Q. Did you take any notes of the distance from the banks from any quarter section corner?

A. We wasn't particular where we started, only we fixed it so we knew when we come out at the end.

By the COURT: You say the range line was surveyed in April?

A. Yes sir.
Q. Now when was these islands and section line run?
A. Why we run all the north lines on the north side of the river first, in the months of March and April and we went over on the south side of the river in May, but these range lines were surveyed in April on account of getting the directions, and after we had the land surveyed on both sides of the river, we surveyed the islands.
Q. When was this done?
A. In May, I think.

Witness excused.

C. B. CHANNEL being recalled by the court, testified as follows:

By the COURT:

Q. By what authority did you put this 18 acres on Exhibit "A"?
A. Well that 18 acres was the proportion between the meander lines in that one island.
Q. How did you find that amount?
A. I calculated that from my own surveys, just a preliminary survey.
Q. You didn't get the 18 acres then from the records?
—. No sir.

Witness excused.

69 A. H. SWINYIER being called and sworn as a witness in behalf of the defendant, testified as follows:

Examined by Mr. NYE:

Q. Where do you reside?
A. I live on Park island.
Q. How far is that from the island in dispute?
A. Well about a quarter of a mile I should judge, a part of it is.
Q. How long have you lived there?
A. Four years this spring.
Q. Do you own the land on which you live?
A. I have homestead papers.
Q. When did you take out those homestead papers?
A. In 1895 in May.

Counsel for plaintiff objects to his testimony that he owns the land for his testimony shows that he has homestead papers. Objection overruled. Plaintiff excepts.

Q. Is that land on which you are living, is that an island?
A. Yes sir.
Q. Is it bounded by any of the channels that bound this land in dispute?
A. Lays in the same channel east of this disputed land.

Q. Lays in the same channel east?
A. Yes sir.
Q. How much land have you there?

Plaintiff objects as immaterial. Objection sustained.

Q. When did you first become acquainted with this land in dispute in section 12?
A. It has been 15 or 16 years ago.
Q. Did you live down there at that time?
A. Yes sir.
Q. You were familiar with the channel on the southeast quarter of section 12 at that time?
70 A. Yes sir.
Q. And you have seen this channel recently?
A. Yes sir.
Q. What would you say as to whether or not these channels have changed their course any?
A. I can't notice any change only there isn't as much water in them now.
Q. You are acquainted with the lay of this land in dispute here between these meander lines?
A. Yes sir.
Q. When did you first become familiar with that piece of land?
A. About 15 or 16 years ago.
Q. What was the nature of the land at that time, was there any vegetation growing on it?
A. Brush, pretty good sized brush and grass.
Q. Was there any indications that that was a channel at one time, this land between the red lines?
A. No sir.
Q. Was it practically the same height and the same kind of vegetation as the land north of Kilgore?
A. More brush.
Q. It had more brush on then?
A. It had more brush than on the islands north and south; all of the islands in there had a good many brush on them.
Q. What would you say as to whether it was as high as the land north of the meander lines?
A. It was as high as a good deal of the land on the other islands.
Q. But it was not a channel?
A. No sir.
Q. Is there any indications there now that it has ever been a channel?
A. No sir.

Counsel for plaintiff objects as incompetent and immaterial. Overruled. Plaintiff excepts.

71 Q. Did you ever help to run the lines on this tract of land in dispute?

A. I think I did, I help carry the chain on the north line that was run there.

Q. You mean this north meander line?

A. Yes sir.

Q. Where did you start at, what point?

A. We started about—I forget, a few chains—what we always knew as half mile north of the island.

Q. Would that be the southwest corner?

A. Yes sir, this corner here (indicating).

Q. And then where did you run?

A. We run to the northeast.

Q. You followed the meander line off to the northeast?

A. Yes sir.

Q. And in following that how many channels did you cross before you reached the east line?

A. Two.

Q. Distinct channels?

A. Yes sir.

Q. Would you say whether they were there when you first became acquainted with the channel?

A. They were.

Q. Just the same as now?

A. Yes sir.

Q. Did you assist in running the south meander line?

A. No sir.

Cross-examination by Mr. OLDHAM:

Q. Now this channel that you call Mosquito channel, how wide is that channel immediately east of the island in dispute?

A. I couldn't say; there are four channels there, I help measure them but have forgotten.

Q. I am not asking you the exact measure, but about how
72 wide is it just before it goes around this island in dispute?

A. Three or four rods wide.

Q. How does that channel divide when it surrounds the island? Does the channel divide equally, half go north and half go south?

A. It is about equally divided until it gets up north of the island then the north side is the widest.

Q. But the channels are pretty near the same width around this island?

A. Yes, sir.

Q. About how wide are the channels on the north and south side of the island?

A. Something over a rod wide.

Q. What portion of the year does water run in those channels now?

A. Doesn't any river water run down there any more, only seep water. They have a railroad bridge built across it now.

Q. And there is but little water in these channels?
A. Only in high water season.
Q. Can you ordinarily drive across the channel?
A. O yes you can cross any of them only in the very highest of the water?
Q. What is the condition of the water in the Platte river at the present as compared with the flow of water 15 or 20 years ago?
A. There isn't as much water.
Q. How long have you lived on the Platte river?
A. About 20 years.
Q. Always lived down close to the river?
A. Yes sir, we didn't live on the island all the time but close there.
Q. And twenty years ago there was a great deal more water in the river than there is now?
A. Yes sir.

By Mr. BEAMAN:

Q. You can drive across any part of the Platte river, can't you?
A. Why we used to drive across it whenever we wanted to except in high water.

Witness excused.

73 Mr. H. J. DUGDALE being called and sworn as a witness in behalf of the defendant, testified as follows:

Examined by Mr. BEAMAN:

Q. Where do you reside?
A. About two miles west of Shelton.
Q. How long have you lived in Buffalo county?
A. Thirty-eight years.
Q. Are you acquainted with the land in controversy in this case?
A. I have seen it but hav-n't been all around it; I have seen it a couple of times.
Q. When did you first see it?
A. About '78.
Q. That was after it was open to settlement?
A. Yes sir.
Q. Do you know the island that the defendant Whitaker in this case is in possession of now, do you know which island that is?
A. Yes sir, I think I do.
Q. How long since you have seen it?
A. Why it has been two years I guess.
Q. When you saw it two years ago, was it practically the same as when you saw it in '78?
A. It was.
Q. What kind of land was it in '78?

A. Why brush and some small cottonwood.

Q. Was it as high as the adjacent islands in '78, that is, was it as high as other islands in the vicinity, in '78?

A. Why yes, I would say they were all about the same through there I rode over them, I didn't pay much attention to them I was herding cattle.

Q. Was there any cottonwood trees there?

A. Yes sir.

Q. Any considerable size?

A. I would say they were a foot through or more.

74 Q. Does the channels down there run the same as they did in '78?

A. Well I went along the township line, I believe it is, and as far as I went I believe they do.

By the COURT:

Q. You mean the range line north and south?

A. Yes sir.

By Mr. BEAMAN:

Q. Did you go south as far as McBride's land?

A. Yes sir, and then went up to Mr. Evans' where his channel divides.

By Mr. CALKINS:

Q. You first become acquainted with — in '78?

A. Yes sir.

Q. What was the occasion of your being acquainted with it?

A. Well, sir, my father had a herd there and I used to go down and herd for three years until '81.

Q. And from that time you hadn't been there until when?

A. About two years ago.

Q. You had no occasion to observe the character of the islands and channels when you were herding there, except the knowledge you gathered by simply riding over them?

A. That is all.

Q. Never had any measurements?

A. No sir.

Q. What season of the year were you herding up there?

A. In the summer time from the 1st of May until the 1st of Nov.

Q. What would you say about the water being higher in those years than now?

A. It was higher then.

Q. It was quite a common thing for the Platte's banks to be full for some weeks in the spring, was it not?

75 A. Yes sir.

Q. And much of the land that was too wet to be plowed have since been put under the plow. I don't mean this immediate vicinity, but generally?

A. There is some land that is plowed that used to be impossible.

Q. And a good many channels have narrowed up and stopped up, have they not?

A. Willows have growed up, yes sir.

Q. Don't you know as a matter of fact about the stopping of several channels where the railroad bridge crosses, of taking out the bridges and filling them up with dirt?

A. No.

Q. Don't you know of such things being done with railroad bridges?

A. No sir.

Witness excused.

GEORGE CARSON being called and sworn as a witness in behalf of defendant, testified as follows:

Examined by Mr. BEAMEN:

Q. Where do you reside?

A. A mile and a half east of Gibbon.

Q. How long have you resided in Buffalo county?

A. Since April '76.

Q. Are you acquainted with this land in controversy in this case?

A. Yes sir.

Q. Do you know the island that is now in the possession of the defendant Whitaker?

A. Yes sir.

Q. When did you first become acquainted with the island?

A. I went there in '78 with a herd of cattle, right up to the head of them there by the railroad.

Q. That was after the reservation was open to settlement?

A. Yes sir.

76 Q. Was anybody in possession of the land around there then?

A. Why Mr. Evans had a homestead and McBride, and a man—I forget his name, right across from where Kilgore's lots are and he went crazy and left.

Q. Have you seen this island recently?

A. Yes sir.

Q. Was it the same as it was in '78?

A. It is except there is not as much brush and timber on it.

Q. What season of the year was it in '78 when you first saw it?

A. In the fall.

Q. Did you see it in the spring of the year in '78 or '79?

A. Yes sir.

Q. Well was it covered with water in the spring of the year?

A. No sir, the channel- all had water in them.

Q. Was this island in '78 about as high as the other islands in that vicinity?

A. I think very near the same as the other islands.

Q. Have those channels which run around this island changed any since '78?

A. No sir, not that I can see.

Cross-examination by Mr. OLDHAM:

Q. What was the condition of the Platte river in '78 as compared with its condition now?

A. A good deal more water then than now.

Witness excused.

C. B. CHANNEL being recalled by the court, testified as follows:

Examined by the COURT:

Q. Do you know whether or not the rules require, in surveying these islands, where an island runs east and west through a section or range line, is it still the rule to survey as an independent tract?

A. The way I understand that is, they ran the township and range lines first and then the section lines; and in running the
77 section lines, when they come to the bank of a stream and considered it large enough to be meandered, they established a meander corner, and as I understand it they went over and ran this meander line with the stream.

Q. This plat shows this island is in two townships, that is a portion of the east end ran over into another township; do you know whether or not it is the rule to survey that as an independent tract or did they only survey up to the range line?

A. If they were surveying the island independent of the other surveys they would undoubtedly survey the whole island.

Q. Without any regard to the other survey?

A. They would survey the corners on that line (indicating) and so note it on the plat book.

By Mr. BEAMAN:

Q. Have you examined the original field notes lately in your possession as county surveyor with reference to this section line south of section 12?

A. I looked over them in the office yesterday, just glanced over them.

Q. Did you find any meander point located where this west channel crossed the south section line of section 12?

A. No sir.

Q. The only meander points that you found on the south line of section 12 are the ones that are indicated by the position of the red lines on that map Exhibit "A"?

A. Yes sir.

Q. And the island point that is referred to in the field notes is a point near the east meander corner, is it not?
A. I believe so, as I remember it.

By the COURT:

Q. Now this island runs on your plat, Exhibit "A," it runs east of the township line; would that part of it east of the township line be a separate lot from the balance of the island, or would the whole island be considered a single lot?
78
A. It would be considered a separate lot, that is, they would calculate the acres separately.
Q. And each be a separate lot?
A. Yes sir.

By Mr. BEAMAN:

Q. Have you a copy of the rules referred to in the United States statute?
A. I think Mr. Porterfield has a copy, I have a copy and I think he has it.
Q. Are you familiar with the rules?
A. I can't say I am; of course I studied them up when I done the Government work.

Witness dismissed.

Defendant rests for the present.

THOMAS MCBRIDE being recalled in behalf of himself as plaintiff *and* testified as follows:

By Mr. OLDHAM:

Q. I will ask you to state where you got the paper I now hand you marked Plaintiff's Exhibit "F"?
A. It was sent me from Washington.

Plaintiff offers in evidence Plaintiff's Exhibit "F" being the patent of the plaintiff, and asks leave to substitute a copy.
No objections, the same is admitted and read in evidence.
Defendant Kilgore offers in evidence his Exhibits "1" and "2" being warranty deeds issued to him for the land described in his cross-petition and asks leave to substitute copies.

79 No objections, same are admitted and read in evidence.

By Mr. BEAMEN to witness MCBRIDE:

Q. I asked you yesterday about that road along this island and I don't know that I got a clear understanding of your testimony; did you testify or did you not, that the road about which I asked you yesterday along this island, was entirely on the island in section 12?

A. It is all on the island.
Q. In section 12.
A. Yes sir.

By the COURT:

Q. Does the road mark the boundary line between you and one of the defendants here as you claim?
A. It is a consent road; no survey was made it was consented between us.

Witness excused.
Whereupon the case was continued until after dinner.

1-30 P. M.

Case again taken up.
Same parties present as before.
Counsel for defendant Kilgore offers in evidence his deeds marked as his Exhibits "1" and "2" and asks leave to substitute copies.
No objections, same are admitted and read in evidence.
Whereupon case was continued for further testimony.

80 FEBRUARY 17TH, 1899.

Case again taken up.
Same parties present as heretofore.

C. B. CHANNEL being recalled for further cross-examination, testified as follows:

Examined by Mr. BEAMEN:

Q. Did you ever compare the field notes from which you made the map marked Exhibit "A" with the field notes that you used to make the survey?
A. In making that map it was made up from actual survey except the meander lines.
Q. You have in your possession as county surveyor the original field notes of the Government survey of this county?
A. A copy of them, yes sir.
Q. What I mean by the question is, whether or not the field notes which you used in making the survey, which is in evidence as Exhibit "A" are the same as the field notes in your possession?
A. Yes sir.
Q. Have you compared them?
A. I think I have.
Q. Will you examine the field notes of this county which are now on file in your office as county surveyor, and tell me the distance between the meander points on the south line of section 12, town 8, range 15, the land in controversy in this case?

A. Between sections 12 and 13?
A. Yes sir, on the line.
A. It is 7 and 70/100 chains.
A. From where?
A. From one meander corner to the other.

By Mr. CALKINS:

Q. Is that on the south line of section 12?
A. Yes sir.

81 By Mr. BEAMAN:

Q. That is the distance between where the red lines on your map Exhibit "A" crosses the section line?
A. Yes sir, on the south.
Q. On the south, and it is how many chains?
A. Seven chains and 70/100.
Q. Seven chains and 70 links?
A. Yes sir.
Q. Now I will ask you to turn to the field notes of the survey on the east line of that same quarter section, and tell me the distance between the meander points on the east line of section 12?
A. The distance there is seven chains and 60 links.
Q. That distance is represented on your map, marked Exhibit "A" by the intersection of the red lines with the east line of section 12?
A. Yes sir.
Q. What is that line, the east line of section 12?
A. It is a range line.
Q. Now on this map, Plaintiff's Exhibit "A" which has been offered in evidence, you have marked there in figures between the meander lines, "about 18 acres." How much land is included in that; what are the boundary lines, in other words, of the 18 acres which you have estimated there?
A. The land included in that 18 acres is the land between the two meander lines on that island.
Q. And it does not include all the land between the two meander lines in the section?
A. It does not.
Q. Can you tell me approximately the amount of land on this island in controversy in this suit, which lies in section 12?

Plaintiff objects as immaterial. Objection overruled. Plaintiff excepts.

A. I should think 25 or 30 acres altogether.
82 Q. In all probability there is more than 21 acres of land in that island, is there?
A. I think so.
Q. Have you ever made any computation of the amount of land between the two meander lines in the section?

A. I never calculated it very accurately, I estimated it.
Q. What would you estimate that to be?
A. The land in the island?
Q. No, the land in the island between the two red lines in section 12?
A. I should say about 28 acres.
Q. Now did you survey Swinyer's island for him?
A. I think I did.
Q. That was an unsurveyed Government island, was it not?
A. I am not quite sure where it is.

Plaintiff objects as immaterial. Objection overruled. Plaintiff excepts.

Q. The one right east?
A. I think I made a preliminary survey of the island marked C on the map.
Q. How many acres did that contain?
A. About 20.
Q. Did you make a preliminary survey of the island east of that?
A. I assisted in making a preliminary survey of the island marked Park island.
Q. Was that an unsurveyed Government island?
A. It was.
Q. How much land did you find in that?
A. I think about 82 acres, I am not sure.

Plaintiff objects as immaterial. Objection overruled. Exceptions.

By Mr. CALKINS:

Q. You didn't succeed in finding your book of rules, did you?
83 A. No sir, I did not.
Q. Is it not the custom of the surveyor general's office when a contract for a survey of land like this contract for the survey of the late Fort Kearney military reservation was made, to send special instructions to the surveyor?
A. I believe it is.
Q. And you hav-n't access to the special instructions, if any were sent to the surveyor of the Fort Kearney military reservation, have you?
A. No sir.
Q. This land was a portion of the Fort Kearney military reservation was it not?
A. Yes sir.

By Mr. BEAMAN:

Q. The regulations issued to surveyors and deputy surveyors has been the same ever since the Government was established, have they not?

A. There has been several laws passed in regard to surveying public lands; it has been changed some I believe.

Q. Isn't it a fact that the instructions are practically the same now as they were in the manual issued by the Government in 1865?

A. I think they are.

By Mr. CALKINS:

Q. This Fort Kearney military reservation was surveyed by a special act of Congress passed in 1865, was it not?

Defendant objects as immaterial. Objection sustained. Defendant Kilgore excepts.

Witness excused.

84 E. N. PORTERFIELD, being called and sworn as a witness in behalf of the defendant, testified as follows:

Examined by Mr. BEAMAN:

Q. Where do you reside?

A. In Kearney, Nebr.

Q. How long have you resided in Kearney?

A. Over thirteen years.

Q. What official positions have you held in Buffalo county?

A. County surveyor.

Q. Did you ever make a survey of any portion of section 12, town 8 range 15, this county?

A. Yes.

Q. Examine Plaintiff's Exhibit "A" which I now hand you, and state whether or not the survey which you made of the portion of section 12, 8, 15, which appears on that map was practically the same as Plaintiff's Exhibit "A"?

A. I think it was about the same.

Q. Wherein did it differ?

A. These meander lines were south on the east side of the section south probably a chain.

Q. Did the meander lines as you located them fall on the banks of any channels there more nearly than that?

A. Yes.

Q. Can you tell me approximately the amount of land in that island which is shown on that map as a part of section 12, can you tell me how much land it approximately contains?

A. No sir.

Q. Can you tell how much land there is between those meander lines in section 12?

A. I should judge between 27 and 28 acres between the red lines.

Q. In the section?

A. Yes.

Q. If there is between 27 and 28 acres between the red lines
85 in the section, there would be at least that much if not more of the island in the section?

A. Yes, there would be according to this plat, I never was down below the section line of 12 or thirteen.

Q. My question was, if there is between 27 and 28 acres between those meander lines in section 12, is it not a fact the amount of the island laying in section 12 would be that much if not more?

A. Yes, probably that much I think.

By Mr. CALKINS: You are just estimating it, you never actually computed it?

A. Why between the red lines I think I computed it.

Q. But never computed it between the red lines in the section?

A. Yes, on the section.

Q. Did you ever compute it between so much of the red lines on the island?

A. No.

Counsel for defendant Whitaker offers in evidence such portion of the Manual of Surveying Instructions for the Survey of the Public Lands of the United States and Private Land Claims, a book prepared in conformity with law under the direction of the Commissioner of the General Land Office, and issued by the Government Printing Office.

On page 21 of said book, I offer the following paragraphs, to wit: "Meander corners are established at all those points where the lines of the public surveys intersect the banks of such rivers, bayous, lakes or islands as are by law directed to be meandered.

Plaintiff objects as no foundation laid and incompetent and immaterial.

By Mr. BEAMAN:

Q. Examine the book I now hand you and state what it is, if you know?

A. This is supposed to be a manual of surveying instructions.

86 Plaintiff objects for the reason the book shows what it is. Objection overruled. Plaintiff excepts.

Q. Who sends out these books if you know?

Plaintiff objects as incompetent and immaterial. Objection overruled. Plaintiff excepts.

A. The Commissioner of the General Land Office or the surveyor general.

Q. When a surveyor is deputized to make a survey is he furnished with a copy of *this* instructions?

Plaintiff objects for the reason the witness has not shown any particular knowledge on that subject. Objection overruled. Plaintiff excepts.

A. He does, this was sent to me.
Q. From the General Land Office?
A. By the Commissioner.
Q. Directing you how to make the public survey?

Plaintiff objects as incompetent, irrelevant and immaterial. Objection overruled. Plaintiff excepts.

A. Yes sir.

Defendant now offers that part of page 21 which was read and also offers that portion of page 31 which reads as follows:

"The letters M. C. for meander corner must be marked on the side facing the river or lake meandered."

Counsel for defendant also offers in evidence that portion of pages 33, 34, and 35 which relates to meandering.

Plaintiff objects as immaterial and as tending to encumber the record. No ruling.

The same is read by Mr. Beaman as follows:

Meandering.

87 SEC. 1. Proceeding down stream, the bank on the left hand is termed the "left bank" and that on the right hand the "right bank." These terms are to be universally used to distinguish the two banks of a river or stream.

SEC. 2. Both banks of navigable rivers, as well as of all rivers not embraced in the class denominated as "navigable" the right angle width of which is the three chains and upwards, will be meandered on both banks by taking the general courses and distances of their sinuosities, and the same are to be entered in the field book. Rivers not classed as navigable will not be meandered above the point where the average right angle width is less than three chains.

At those points where either the township or section lines intersect the banks of a navigable stream, or any meanderable line, corners are to be established at the time of running these lines. These are called "meander corner-." By the same method you are to meander the opposite bank of the same river.

The crossing distance between the meander corners on the same line and the true bearing and distance between opposite meander corners is to be ascertained by triangulation or direct measurement, in order that the river may be protracted with entire accuracy. The particulars to be given in the field notes.

The subdividing deputies will be required to establish meander corners on both sides of such meanderable streams at the intersection of all section lines, and the distance across the river determined as above directed, will be noted in the field book.

In meandering water courses, where distance is more than ten chains between stations, whole chains should be taken; but if the distance is less than ten chains, and it is found convenient to employ chains and links, the number of links should be a multiple of

ten, thereby saving time and labor in testing the closings both in the field and in the surveyor-general's office.

SEC. 3. You are also to meander in manner aforesaid, all lakes, and deep ponds of the area of twenty-five acres and upwards; also navigable bayous; shallow ponds, readily to be drained or likely to dry up, are not to be meandered.

88 In meandering lakes, bayous, or ponds you are to commence at a meander corner, and proceed as above directed for meandering the banks of navigable streams; and from said corner stake the courses and distances of the entire margin of the same, noting the intersections with all meander corners established thereon.

You will notice all streams of water falling into the river, lake or bayou, you are surveying, stating the width of the same at their mouth; also all springs, noting the size thereof and depth, and whether the waters be pure or mineral; also the head and mouth of all bayous; and all islands, rapids, and bars are to be noted with intersections to their lower and upper points to establish their exact situation. You will also note the elevation of the banks of rivers and streams, the heights of falls and cascades, and then length of rapids.

To meander a lake or deep pond lying entirely within the boundaries of a section, you will run and measure two lines thereunto from the nearest section or quarter section corner on opposite sides of such ponds, giving the courses of such lines. At each of the points where such lines shall intersect the margin of such pond or lake you will establish a meander corner as above directed. (See "meander corners.")

The relative position of these points being thus definitely fixed in the section, the meandering will commence at one of them and be continued to the other, noting their intersection, and thence to the beginning. The proceedings are to be fully entered in the field book.

SEC. 4. Meander lines should not be established at the segregation line between dry and swamp or overflowed land, but at the ordinary low water marker of the actual margin of the rivers or lakes on which such swamp or overflowed land is bordered. In cases where such meander lines were formerly established at the segregation line, between dry and swamp or overflowed land, new and proper meander lines may be established under the direction of the surveyor-general, and the township and section lines extended over such swamp or overflowed lands and the corners established as hereinbefore provided, in order that the plats and field notes of surveys may show the actual facts in the case.

5. The precise relative position of islands, in a township made fractional by the river in which the same are situated, is to

89 be determined trigonometrically; ci-ting to a flag or other fixed object on the island from a special and carefully made base line, connected with the surveyed lines, on or near the river bank, you are to form connection between the meander corners on

the river to points corresponding thereto, in direct lines, on the bank of the island, and there establish the proper meander corners, and calculate the distance across.

6. In taking the connection of an island with the main land, when there is no meander corner in line, opposite thereto, to sight from, you will measure a special base from the most convenient meander corner and from such base you will triangulate to some fixed point on the shore of the island, ascertain the distance across, and there establish a special meander corner, wherefrom you will commence to meander the island.

7. In the survey of lands bordering on tidewater, "meander corners are to be established at the point where the surveyed lines intersect high-water mark, and meanders are to follow the high water line.

8. The field notes of meanders will be set forth in the field-books showing the dates when the work is performed as illustrated in the specimen notes annexed. They are to state and describe particularly the meander corner from which they commenced, and each one upon which they close, and are to exhibit the meanders of each fractional section separately; following, and composing a part of such notes, will be given a description of the land, timber, depth of inundation to which the bottom is subject and the banks, current, the bottom of the stream or body of water you are meandering. The utmost care must be taken to pass no object of topography, or change therein, without giving a particular description thereof in its proper place in your meander notes."

Counsel for defendant now offers so much of page 43 of the same book, which reads as follows:

"If a part or the whole of one or more of the boundaries is made up of meander lines, the total northings, southings, eastings and westings of such lines will take the place of the missing N. and S. or E. and W. lines so as to present the total errors of the township boundaries, considered as a closed survey. If all the exte-
90 rior lines have been surveyed by the deputy, the bearings and distances for the table will be taken from his own notes. In a case where some of the boundaries have been surveyed under an older contract, the deputy will use the bearings and distances supplied by the surveyor general in connection with his own lines, and if the errors exceed the allowance defind in paragraphs 4 and 5 of the "Proscribed Limits" he will determine where the error occurs, correct the same before he leaves the field, and place the table in his field note book. This requirement is made necessary by the frequent occurrence of errors in the exterior lines of which nothing is known in this office until after the township has been subdivided and the returns taken up for examination and settlement of the account, and then much correspondence and delay results in injury to the service and sometimes in trouble for settlers.

Counsel for plaintiff also offers in evidence that portion of page 42 of the same book which reads as follows:

"5. Intersections by line of land objects. The distance at which the line first intersects and then leaves every settler's claim and improvement; prairie, river, creek, or other 'bottom'; or swamp, marsh, grove and wind-fall, with the course of the same at both points of intersection; also the distances at which you begin to ascend, arrive at the top, begin to descend, and reach the foot of all remarkable hills and ridges with their courses, and estimated height in feet above the level land of the surrounding country, or above the bottom lands, ravines, or waters near which they are situated.

6. Intersections by line of water objects. All rivers, creeks, and smaller streams of water which the line crosses; the distances on line at the points of intersection, and their widths on lines. In cases of navigable streams, their width will be ascertained between the meander corners, as set forth under the proper head.

10. Bottom land—to be described as wet or dry, and if subject to inundation, state to what depth.

Counsel for plaintiff objects as incompetent and immaterial. No ruling.

91 Counsel for defendant offers in evidence paragraphs 2, 3, 4, and 8, on page 48 of the same book, which reads as follows:

"The subdivisions of fractional sections into the 40 acre lots (as near as may be) are to be so laid down on the official township plat in broken lines as to admit of giving to each a specific designation, if possible, according to its relative position in the fractional section as per example afforded by diagram C, as well as by number, in all cases where the lot cannot properly be designated as a quarter-quarter. Those fractional subdivision-lots which are not susceptible of being described according to relative local positions, are to be numbered in regular series; those bordering on the north boundary of the township to be numbered progressively from east to west, and those bordering on the west boundary of a township to be numbered progressively from north to south, in each section. As section 6 borders on the north and west boundaries of the township, the fractional lots in the same will be numbered as follows: Commencing with No. 1 in the northeast, thence progressively west to No. 4 in the northwest, and south to No. 7 in the southwest corner of the section.

In numbering fractional lots other than those above specified, (wherever practicable and as a general rule), the series should commence with No. 1 in the northeastern or the most easterly fractional lot, and continue from east to west, and west to east, alternately to the end of the series, as shown in diagram C: but such general rule is departed from under circumstances given as examples in said diagram.

Interior lots are to be, as nearly as possible, 20 chains long by 20 chains wide; and the excess or deficiency of measurement is always

to be thrown on the lots bordering on the northern and western boundaries of the township, or those made fractional by meander lines.

The official township plats to be returned to the General Land Office *is* to show on its face, on the right hand margin, the meanders of navigable streams, islands and lakes. Such details are wanted in the adjustment of the surveying accounts, but may be omitted in the copy of the townsip plat to be furnished to the district land office by the surveyor general. A suitable margin for bind-
92 ing is to be preserved on the left hand side of each plat.

Each plat is to be certified, with table annexed, according to the forms subjoined to "Diagram C" and is to show the area of public lands, of private surveys, and of water, with the aggregate area as shown on the diagram.

All towns, settlements, permanent buildings, private claims, reservations, water courses, ditches, lakes, islands, mountains, butts, canons, roads, railroads, telegraph lines, canals &c., will be shown upon the plats and designated by proper names when such are known."

Counsel for plaintiff objects as incompetent and immaterial. No ruling.

By the COURT:

Q. Where did you obtain this book?
A. I obtained it from the Commissioner.
Q. Upon application?
A. No, I done a little Government surveying.
Q. You were appointed deputy?
A. Yes sir.
Q. And in connection with your appointment was this book sent to you?
A. Yes sir, along with other specific instructions.
Q. Sent from the Department of the Interior?
A. Yes sir.

By Mr. BEAMAN:

Q. Have you those specific instructions?
A. No sir.

By the COURT:

—. Do you know whether or not this book contains the rules whereby the general surveys are carried on?
A. Those are the general rules, I presume they are. There seems to be an item in regard to islands left out, but on the other
93 hand they specify for lakes and ponds, and if you meander a pond or lake it is the same as an island; the same rule applies to both.

By the COURT: The objections to the offers are all overruled; to which ruling the plaintiff and the defendant Kilgore each except.

Witness excused.

GEO. S. WHITAKER, being called and sworn as a witness on his own behalf as defendant, testified as follows:

Examined by Mr. BEAMAN:

Q. Where do you reside?
A. Six miles east and two miles south of Kearney, Buffalo Co.
Q. Where were you born?
A. I was born in Illinois.
Q. Have you ever taken a public homestead?
A. I never have.
Q. Or pre-emption?
A. No sir.
Q. Are you the head of a family?
A. I am.
Q. Do you reside upon this land in controversy?
A. Yes sir.
Q. Have you a house on the land?
A. Yes sir.
Q. How large is the house?
A. Fourteen by eighteen, two rooms.

Cross-examination by Mr. OLDHAM:

Q. When did you come on this land in dispute?
A. Year ago last April.
Q. Did you ever make a filing on the land?
A. I never have.
94 Q. Did you ever attempt to file on it?
A. I made an application is all for a survey by the Government.
Q. To what department of the Government did you make your application?
A. The Interior Department.
Q. When you wrote to the Interior Department at Washington for a survey of the land, did you get any communication from them?

The defendant objects as improper cross-examination and incompetent and immaterial. Objection overruled. Defendant excepts.

A. Yes sir.
Q. Have you got the communication they sent back to you?
A. I hav-n't it with me, I think I have it at home.
Q. I will ask you to examine the paper I now hand you, Plain-

tiff's Exhibit "C" and state whether or not this is a copy of the answer of the Secretary of the Interior to your application?

Defendant objects as incompetent and immaterial, and irrelevant. Objection overruled. Defendant excepts.

A. Yes sir I think that is the letter I got as near as I can tell.

Plaintiff offers in evidence Plaintiff's Exhibit "C" being the copy of the letter.

Defendant objects as incompetent, irrelevant and immaterial and for the further reason no foundation laid, and that this is not the original letter, and they have made no demand upon us for the original.

By the COURT: The objection overruled and the letter received for the purpose of showing his application was refused. Defendant excepts.

Witness excused.
Case closed.

(Here follows diagram marked page 95.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

96 PLAINTIFF'S EXHIBIT "B."

United States Land Office.

GRAND ISLAND, NEB., *Dec.* 8, 1892.

Thomas McBride, Gibbon, Nebr.

DEAR SIR: This office rejected your application to enter island in Platte river in section 12 and 13–8–15 west, and return to you $5.30, money paid for said entry; for the reason that said island has not been surveyed as shown on our plat; we allowed Peter McBride to make an entry under similar conditions, but we find by letters on file in this office that such islands cannot be homesteaded but revert to the persons who own land adjoining the same. You have the right to appeal from the decision of this office, but the department has already rejected similar applications.

Yours respectfully, D. C. HALL, *Rec.*

97 PLAINTIFF'S EX. "C."

41786–1897.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 26, 1897.

Mr. George S. Whitaker, Kearney, Nebraska.

SIR: I am in receipt of your letter dated April 26, 1897, inclosing a diagram showing three alleged islands in the Mosquito channel of the Platte river in section 7, T. 8 N. R. 14 W. and sections 12, 13 and 14, T. 8 N. R. 15, W. Nebraska, marked "A," "B" and "C."

You ask if this office will consider an application for the survey of all of the island and if not, whether it will consider an application for the survey of the island marked "C" on your diagram.

In reply you are advised that this office will not consider an application for the survey of any of the so called islands, for the following reasons, viz.

In 1894, the department approved the application of R. A. Whittier of Kearney, Nebraska, for the survey of said islands and special instructions were issued to Mr. C. B. Channel U. S. deputy surveyor, who was directed to the effect that if he found upon inspection of the premises in the field, the facts as were represented in Mr. Whittier's application to proceed to execute the survey of the island. He reported to this office in his letter dated January 13, 1895, that he did not find the facts as were represented by Mr. Whittier in his application concerning the character and condition

of the islands and submitted a diagram which showed that the river had changed its course since the survey of the township embracing the same, and that the so called islands were connected with land which had been previously surveyed and disposed of by the Government.

The matter was again, January 26, 1895, submitted to the department, in view of the changed conditions found by Mr.
98 Channel, and the Secretary of the Interior in his letter to this office, dated February 18, 1895, concurred in the recommendations of this office, that no further action looking to the survey of any of the alleged islands be taken.

Very respectfully,

——— ———,
Commissioner.

99 PLAINTIFF'S EXHIBIT "D."

1767–1895.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February* 16, 1895.

Mr. Thomas McBride, Kearney, Nebraska.

SIR: I am in receipt of your letter dated December 7, 1894, asking if you can take the small island situate in the Mosquito channel of the Platte river adjacent to your land described as being lot 8 of section 13, and lots 1 and 5 and N. E. ¼ of N. E. ¼ of section 13, T. 8, N. R. 15 W. 6th P. M. Nebraska.

You state that you have fenced in the island with lot 8 of section 12, which you own, and that said island is a part of the land application for the survey of which has been made by R. A. Whittier.

In reply I have to say that application for the survey of a so-called island or islands situate in the Mosquito channel of the Platte river in section- 13 and 14 of the township and range aforesaid, was made by R. A. Whittier, and upon the representations contained in his application the same was approved by the department and the survey ordered thereon. Special instructions were subsequently issued in favor of C. B. Channel for the survey of the island.

When Mr. Channel went upon the ground he found that the facts as to the location of the island or islands were different from those represented by Mr. Whittier in his application for the survey, and that it was shown by Mr. Channel that the river had changed its course and the islands, so called, are attached to lands previously surveyed and disposed of by the Government.

This office, therefore, on January 26th, 1895, referred the
100 matter to the Hon. Secretary of the Interior for further instructions, but has not as yet, heard from the department on the subject.

From the evidence presented with the report to the department on January 26, last, it is apparent that if a survey of the alleged island was made, it would conflict with the former U. S. surveys, and while there may have been two or more small islands in the Mosquito channel of the Platte river in section- 12, 13, 14, and 7 of Ts. 8 N. Rs. 14 and 15 W. 5th P. M. Nebraska, which were omitted at the time of the original survey of the townships, the conditions are now changed, as aforesaid.

This being the case, this office must decline to express an opinion as to whether or not the title to the islands is in the proprietor or proprietors of the land on the nearest main shore opposite thereto.

Very respectfully, S. W. —— ——,
Commissioner.

101 PLAINTIFF'S EXHIBIT "F."

Homestead Certificate No. 5914. *Application* 7293.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Grand Island, Nebraska, whereby it appears that pursuant to the act of Congress approved the 20th of May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Thomas McBride has been established and duly consummated in conformity to law, for the lot numbered eight of section twelve, and the lots numbered one and five and the northeast quarter of the northeast quarter of section thirteen in township eight north, of range fifteen west, of the six thprincipal meridian, in Nebraska, containing one hundred and forty three acres and eighty hundredths of an acre, according to the official plat of the survey of the said land, returned to the General Land Office by the surveyor general:

Know ye: That there is, therefore, granted by the United States unto the said Thomas McBride, the tract of land above described: To have and to hold, the said tract of land, with the appurtenances thereof unto the said Thomas McBride, and to his heirs and assigns forever.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereto affixed.

Given under my hand, at the city of Washington, the twenty-eighth day of March, in the year of our Lord one thousand eight

hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

By the President, GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
[SEAL.] S. W. CLARK,
Recorder of General Land Office.

Recorded vol. 12, page 200.

102 DEF'T KILGORE'S EXHIBIT "1."

Know all men by these presents: that Abraham Rayburn, a single man, of Buffalo county and State of Nebraska in consideration of the sum of eight hundred dollars in hand paid by William H Kilgore of Buffalo county and State of Nebraska do hereby sell and convey unto the said William H. Killgore the following described premises, situated in the county of Buffalo and State of Nebraska, to wit:

Lots five (5) six (6) and seven (7) in section seven (7); and lot four (4) in section (8) in township eight (8) north of range fourteen (14) west; and lot six (6) in section twelve (12) in township (8) north of range fifteen (15) west containing in all one hundred sixty-seven and 30/100 acres.

Together with all the tenements, hereditaments and appurtenances to the same belonging, and all the estate, right, title, interest and claim or demand whatsoever of the said Abraham Rayburn of, in or to the same, or any part thereof.

To have and to hold the above described premises with the appurtenances unto the said William H. Kilgore and to his heirs and assigns forever.

And I hereby covenant with the said William H. Kilgore that I hold said premises by good and perfect title; that I have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrances whatsoever. And I covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

Signed this 14th day of September, A D. 1889.

ABRAHAM RAYBURN.

In presence of
H. C. ANDREWS.
C. M. HULL.

THE STATE OF NEBRASKA, } ss:
Buffalo County, }

On this — day of September A. D. 1889, before me H. C. Andrews a notary public duly commissioned and qualified for and re-
103 siding in said county, personally came Abraham Rayburn, a single man to me known to be the identical person described

in and who execut
knowledged the said
Witness my hand
written.

[SEAL.]

104

Know all men by t
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Nebraska, for and in
lars in hand paid, do
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Nebraska the followi
county and State of N
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two (2) in section thir
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his heirs and assigns
that they are free fron
lawful authority to s
warrant and defend t
claims of all persons w
And the said Hattie
and to the above descr
Signed this 20th da

In presence of
H. C. ANDRE
C. M. HULL.

THE STATE OF NEBRA
Buffalo County,

On this 26th day of
duly commissioned and
personally came Willia
known to be the identi
the foregoing conveyan
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Witness my hand an
written.

[SEAL.]

(Here follow

in and who executed the foregoing conveyance as grantor and acknowledged the said instrument to be his voluntary act and deed.

Witness my hand and notarial seal the day and year last above written.

H. C. ANDREWS,
Notary Public.

[SEAL.]

104 DEF'T KILGORE'S EX. "2."

Know all men by these presents: That William Walker and Hattie Walker husband and wife of the county of Buffalo and State of Nebraska, for and in consideration of the sum of one thousand dollars in hand paid, do hereby grant, bargain, sell and convey and confirm unto William H. Kilgore of the county of Buffalo and State of Nebraska the following described real estate, situated in Buffalo county and State of Nebraska:

Lot one (1) two (2) and three (3) in section fourteen (14) and lots two (2) in section thirteen (13) and lot seven (7) in section twelve in township eight (8) north of range fifteen (15) west, containing in all one hundred and sixty-eight and 90 / 100 acres more or less.

And we do hereby covenant with the said William H. Kilgore and his heirs and assigns that we are lawfully seized of said premises; that they are free from incumbrance, that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Hattie Walker hereby relinquishes all her dower in and to the above described premises.

Signed this 20th day of October, A. D. 1889.

WILLIAM WALKER
HATTIE WALKER.

In presence of
H. C. ANDREWS
C. M. HULL.

THE STATE OF NEBRASKA, } ss:
Buffalo County, }

On this 26th day of October, A. D. 1889, before me a notary public duly commissioned and qualified for and residing in said county personally came William Walker and Hattie Walker his wife to me known to be the identical persons described in and who executed the foregoing conveyance and acknowledged the said instrument to be their voluntary act and deed.

Witness my hand and notarial seal the day and year last above written.

H. C. ANDREWS,
Notary Public.

[SEAL.]

(Here follows diagram marked page 105.)

106 STATE OF NEBRASKA, } ss:
Buffalo County, }

I hereby certify that the above and foregoing is a true and correct transcript of all the oral and documentary evidence offered and introduced on the trial of the case of McBride *vs.* Whitaker, together with all objections interposed, the rulings thereon and exceptions taken to such rulings.

Witness my hand this 22nd day of July, 1899.

C. B. SCOTT,
Official Reporter.

Fees for bill of exceptions, $12.25.
Received payment from E. C. Calkins.

C. B. SCOTT.

Received the above and foregoing plaintiff's bill of exceptions on this 22nd day of July, 1899, and herewith return the same on this 31st day of July, 1899, without any objections or recommendations.

F. E. BEAMAN AND
FRED A. NYE,
Attorneys for Defendant.

107 STATE OF NEBRASKA, } ss:
Custer County, }

I, Homer M. Sullivan, judge of the twelfth judicial district, hereby certify that I have examined the above and foregoing transcript of the evidence in the case of McBride *vs.* Whitaker, and it appearing that the same has been prepared and served within the time heretofore allowed by the court, and the same appearing to be in all respects true and correct, and there being no objections or recommendation made by the opposite party, I therefore, hereby, approve, sign and settle the same as the plaintiff's bill of exceptions in said cause, and hereby order that it be made a part of the record in said cause in said court.

Witness my hand this 4th day of August, A. D. 1899.

HOMER M. SULLIVAN,
Judge 12th Judicial District.

STATE OF NEBRASKA, } ss:
County of Buffalo, }

I, Peter O'Brien clerk of the district court do hereby certify that the above and foregoing is the original plaintiff's bill of exceptions filed in said cause in this court.

Witness my hand and official seal this 28 day of November, 1899.

PETER O'BRIEN,
[SEAL.] *Clerk Dist. Court.*

10 cent revenue stamp.

108 And on the same day there was issued out of the office of the clerk of said supreme court a certain notice of appeal directed to the sheriff of Buffalo county, Nebraska, being in the words and figures following, to-wit:

Notice of Appeal.

THE STATE OF NEBRASKA, *ss:*

To the sheriff of the county of Buffalo:

You are hereby commanded to notify George W. Whitaker and —— Whitaker, his wife, that an appeal has been taken to the supreme court of the State of Nebraska by William H. Kilgore and —— Kilgore, his wife, and Thomas McBride asking the reversal of a judgment against them rendered at the May term, 1899, in a certain cause in the district court of Buffalo county, wherein Thomas McBride was plaintiff and George W. Whitaker, *et al.*, were defendants and to appear before the supreme court at the city of Lincoln, on the 2nd day of January, 1899, then and there to do and receive what the said supreme court shall order in the premises.

You will make due return of this notice, on or before ten days after you have received the same.

Witness my hand and the seal of said court, at the city of Lincoln, this 29th day of November, 1899.

[SEAL.] D. A. CAMPBELL, *Clerk.*

And afterward, to-wit, on the 6th day of December, A. D., 1899, said notice was returned and filed in the office of the clerk of said supreme court, endorsed as follows, to-wit:

109 Due service of the within notice is admitted this 4th day of December, 1899, reserving all rights as if this notice had been served by the officer to whom it is directed, and not accepted.

FRED A. NYE,
FRANK E. BEEMAN,
Att'ys for Def'ts Whitaker.

General No. 11090. Supreme court. State of Nebraska. Thomas McBride, appellant, *v.* George W. Whitaker, *et al.*, appellees. William H. Kilgore, *et al.*, appellants. Notice of appeal. Supreme court of Nebraska. Filed Dec. 6, 1899. D. A. Campbell, clerk.

And afterward, to-wit, on the 21st day of January, 1902, the following, among other proceedings, were had and done in said supreme court, to-wit:

The following causes were argued and submitted:

11090. McBride *v.* Whitaker. Appeal, Buffalo county.

And afterward, to-wit, on the 4th day of June, 1902, there was rendered by said court and entered of record upon the journal thereof, a certain judgment in the words and figures following, to-wit:

THOMAS MCBRIDE, Appellant, *v.* GEORGE W. WHITAKER and —— WHITAKER, His Wife, Appellees, Impleaded with William H. Kilgore and —— Kilgore, His Wife, Appellants.	No. 11090. Appeal from the District Court of Buffalo County. Judgment of Reversal.

110 This cause came on to be heard, was taken up and argued by counsel, on consideration whereof, the court finds there is error apparent on the record in the proceedings and judgment of the district court. It is, therefore, considered by the court that said judgment be and the same hereby is reversed and said cause remanded to said district court with directions to said court to enter a decree quieting the title to the north half of the island in dispute in the defendant Kilgore, and the south half in the plaintiff, McBride. It is further ordered by the court that the appellants pay the court costs incurred herein by them, taxed at $—, and have and recover of the appellees all of their costs herein, taxed at $—, for which execution is hereby awarded; that said appellees pay their own costs, taxed at $—; and that a mandate issue accordingly.

And on the same day there was rendered by said supreme court and filed in the office of the clerk thereof a certain opinion in words and figures following, to-wit:

111 *Opinion Filed June* 4, 1902.

MCBRIDE *v.* WHITAKER. } No. 11090.

Commissioner's opinion, department No. 3.

Grants of land bounded upon a river not navigable carry with them the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the bank or margin of the river, the rule of the common law being that proprietors of land adjoining public rivers not affected by the flow of the tide own the soil *ad filum aquæ*.

2. A grant of land bounded upon a non-navigable river made by the General Government with reference to the plat of the survey, which shows a meandered line along the river bank,

conveys to the grantee title to such unsurveyed islands or parts of islands as lie within that limit.

3. The power to make and correct surveys of the public lands, belongs exclusively to the political department of the General Government, and a plat of a survey made and approved by that department can not be impeached in the courts, except upon a direct proceeding for that purpose.

4. A party defendant in an action to quiet title, can not be heard to complain that the action was brought on the equity side of the docket when by his answer, he has invoked the action of the court in his own behalf.

112 DUFFIE, *C.*:

The north-east quarter (¼) of section twelve (12) township eight (8) north of range fifteen (15) west in Buffalo county, Nebraska, is intersected by a channel of the Platte river, known as Mosquito channel. That part of the section lying north of this channel was surveyed into one full forty acre tract, and two fractional lots numbered on the Government plat as six and seven. That part of the quarter section south of the channel consists of a fractional lot marked on the Government plat as lot eight. About midway between these lots in the center of the channel is an island which was never surveyed, and McBride, the owner of lot eight, and Kilgore w-o claims to be the owner of lots six and seven, each claim title to a portion of this island, asserting that their grant of the fractional lots above mentioned gave them title to the thread of the channel including all islands or parts of islands embraced within this limit. McBride and Kilgore could not agree upon a division of the island and the possession thereto shifted between them, but for many years previous to 1897, one or the other of these parties has been in the actual possession of the island. In April 1897, the defendant Whitaker took possession of the island and has had actual possession from that time. This action was brought by the appellant McBride to quiet his title to so much of the island as might fall within the terms of his grant, his petition alleging that the meandered lines as shown by the field notes do not coincide with
113 the banks of the said Mosquito channel as they now exist, and that there is a controversy between the plaintiff and the defendant Kilgore as to where said boundary line should be located. He asks that the boundary line be ascertained and established by the court and his title established as against the claim of Kilgore. Whitaker was made a party defendant in this action, it being alleged in the petition that Whitaker had moved upon the island and erected a house thereon and made claim to the ownership thereof. The court made certain findings of fact and conclusions of law upon which judgment was entered, from which judgment and decree the plaintiff McBride and the defendant Kilgore have appealed to this court. The court's findings are as follows:

"The court finds that the plaintiff McBride at the time of the

bringing of this suit was the owner of lot eight in section twelve, township eight, range fifteen, in Buffalo county, Nebraska. That he made the original entry therefor and has been in the open and notorious possession of the same for fifteen or twenty years.

"The court further finds that the defendant W. H. Kilgore at the beginning of this suit and for a long time prior thereto was the owner of lots six and seven in said section; that he became the owner of the same by virtue of a deed to him from the original patentee of said tract, and that he had been in possession of the same for more than ten years prior to the bringing of this
114 suit.

"That said tract of land, with other land, was within the extreme channels of the Platte river; and that lying between lots six and seven on the north, and lot eight on the south, was a tract of land in said section twelve of about twenty-two acres entirely surrounded by certain channels in the Platte river, and which is the tract of land in dispute herein.

"That the Government surveyor- when originally surveying said lots six and seven did not actually survey the meander line forming the south line of lots six and seven as they were required to do; but that instead of making an actual survey of said meander line along the said channel bordering on said lots six and seven, they falsely show upon the map made by them that they had done so, and located upon said plat what they supposed to be the true meander line of said lots six and seven. That they never made an actual survey of the north meander line of said lot eight, but indicated upon the plat made by them what they supposed was the meander line of said lot eight. That they never actually surveyed the meander line of said tract of land lying between lots six and seven on the one side and lot eight on the other and which tract is spoken of in the evidence as an island, but that they indicated upon the plat the general outlines of said island as they understood it to be.

"The court further finds that said channels bordering said
115 tract in dispute, the one being on the south of lots six and seven and the other on the north of lot eight, are substantially the same now as they were at the time the original survey was made, and that said channels are substantially as shown by the plaintiff's plat marked Plaintiff's Exhibit "A" offered in evidence.

"The court further finds that the defendant Kilgore at all times since he became the owner of said lots six and seven, claimed to be the owner of the tract in dispute as part of his said lots six and seven; that such claim had not extended over the period of ten years at the bringing of this suit; that he had possession during a part of the time of said claim of all of said tract and all the time a part of said tract.

"That McBride, ever since he obtained his final receipt to lot eight has claimed to be the owner of a part of said island. That they together have had the title to lots six and seven on the one side and lot eight on the other, and have had possession of the

island for more than ten years prior to the bringing of this suit, but that they were contending between themselves during said period as to what part of said island each should have and did not agree.

"The court further finds that the south line of said lots six and seven is the channel as shown in Exhibit "A" and that the north line of said lot eight is the channel bounding it on the north as shown in said Exhibit "A."

116 "As a matter of law, the court concludes that said island should have been surveyed by the Government surveyor-; that it was a neglect of duty on their part to not survey the same. That the title to said island still remains in the United States. That it was never the intention of the Government at the time it gave the patent to said lots six and seven to convey any part of the island, nor was it the intention of the Government to convey it to the patentee of lot eight.

"That the only interest the defendant Whitaker has in said land is that he claims the right to enter the same as a homestead, and that his right is only what possession would give him, and that he has no title thereto.

"The court further concludes as a matter of law, that the Government is not bound by the failure of the surveyor hired to do this work by his neglect to perform his duty, and that his failure to actually survey said island did not thereby give the parties to whom the Government grant- the land on either side thereof any right to it."

We d-ubt very much whether the petition presents a case of equitable jurisdiction. The fact that the plaintiff McBride and the defendant Kilgore each claim ownership of a part of the island in dispute, but can not agree upon the division to be made thereof does not in our opinion, present any matter for the equitable interference of the court. Conceding, as we think we must, that as be-

117 tween themselves their claim to ownership of the island is a valid and legal claim and passes to them with the grant of land along the shore of the channel, the fact that the dividing line between them is in dispute is not a matter concerning which the equitable jurisdiction of the court may be invoked. Each concedes to the other the ownership and legal title to a portion of the island. The only matter in dispute between them is the establishment of a dividing line, and this is certainly a matter which a court of law has full power and authority to adjust.

Both parties have, however, treated the action as one to quiet title, and it was held in Mollie *v.* Peters, 28 Nebr., 670, that "Where both parties to a suit by their pleadings claim title to the same tract of land, and each asks to have his title quieted, it is too late after decree for the losing party to urge for the first time that the proper remedy was by an action of ejectment." See also Baumann *v.* Franse, 37 Nebr., 807–811, and cases there cited.

The evidence is undisputed that the Government in the original survey of the land lying along the channel in which the island in

dispute is located meandered said channel and ascertained by such survey the number of acres in the respective lots afterward granted to McBride and the grantor of Kilgore. We believe that the rule is without exception that a grant of land bounded upon a river which is not navigable carries with it title to the soil to the center of
118 the stream. Justice Maxwell in Wigenhorn *v.* Kountz, 23 Nebr., 690, states the rule in the following language]: "There is no doubt of the rule that grants of land upon a river not navigable carry with them the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, the rule of the common law being, that proprietors of land adjoining public rivers, not affected by the flow of the tide, own the soil *ad filum aquæ.*"

The evidence in this case discloses that when the Fort Kearney military reservation was surveyed by the Government, instructions were issued to those in charge of the work, to survey only such islands in the Platte river as contained twenty-one acres or upwards. For many years previous to that survey, the question of the title to islands in non-navigable rivers under a grant by the United States had been settled by the Supreme Court of the United States, and a long line of decisions had been handed down by that court affirming the right of the purchaser of lands bounded by a non-navigable stream to claim title to the islands falling within the grant. The conclusion therefore, is irresistible that it was the intention of the Government to give title to all unsurveyed islands in the Platte river to the grantee of the land bounded by the bank of that river, and the fact that the island in dispute in this case was not surveyed is conclusive evidence as against every one except the Government itself that it passed by a grant of land
119 bounded by the river. As between McBride and Kilgore each affirming that a portion of this island passed to them by virtue of the grant of the shore lands, we think the court erred in holding that they were not entitled thereto. The United States is not a party to this case asserting title to this land. It is not insisted that a mistake was made by its surveyor and that the island in fact contained a sufficient quantity of land to require it to be surveyed, and no third party is here claiming any title to this island derived from the Government. In this condition of the case, we think the court should have determined from the evidence what part of the island each of these parties were entitled to claim, acting upon the theory that the island was one which was not to be surveyed under the instructions from the Land Department, and that it passed by a grant made by the Government of the shore lands lying opposite. Whether either of these parties had by his evidence established a clear legal title to any part of this island, is not in our opinion the material question in the case. As between themselves, each con-ceded to the other title to a part of the island in dispute, and the question to be settled was the division line. This question the court

should have determined, and not have left the parties to establish their rights by physical force, inviting breaches of the peace and violation of the law by turning them out of court and disregarding rights which each concede to the other. Of course, such a
120 decree would not be binding upon the Government which is not a party to the action, and no rights of the Government could suffer by the entry of such a decree. Should the Government at any time hereafter desire to open this question and to claim this island for itself or for any grantee, no judgment which this court could enter in this case, could, in any manner, prejudice its rights as its title to this island could not be affected by proceedings in a case to which it is not a party. Under the belief that this is the correct rule to be applied to these two parties, who are each insisting that the island passed to them under the grant of the shore land, we have examined the evidence relating to the location of the island, and so nearly as we can ascertain therefrom, we think that it establishes that the island was originally located in the center of the stream midway between the land now held by Kilgore and McBride, and that each of these parties is entitled to one-half of that island.

Coming now to the claim of Whitaker, another and an important question is presented. To every one holding land, the title to which is traced from the United States, the question- what is taken by the grant, and who may question its extent are of great interest and importance. And first we will dispose of an objection made by Whitaker to the jurisdiction of the court. It is said that if a court of equity can try the question raised, that there is no purpose of having an action of ejectment or forcible entry and detention,
121 and that a litigant may always avoid a jury trial in an action concerning real estate by labelling it *quia timet*.

If McBride and Kilgore are the owners of the fee of this island, they could undoubtedly maintain ejectment against Whitaker for the possession and a resort to equity would be unnecessary, and many cases are found holding that a naked trespasser can gain no right as against one in peaceable possession, and that former peaceable possession is sufficient evidence of title to maintain ejectment. Jackson *v.* Hazen, 2 Johns., 438; Whitney *v.* Wright, 15 Wend., 171; Hubbard *v.* Little, 9 Cush., 475; Swift *v.* Agnes, 33 Wis., 240.

In the present case while Whitaker in his answer objected to the jurisdiction of a court of equity to entertain the action against him, he did not stop with that, but alleged that he had taken possession of the island for the purpose of claiming a homestead thereon under the homestead laws of the United States, and in his prayer he asked the following relief: "That the court decree said lands to be Government lands, and subject to entry, and that plaintiff be decree- to have no right, title or interest in said lands, and that defendant George Whitaker, is in lawful possession thereof." It is the opinion of the writer that Whitaker can not, after calling on the court for action in his own interest, and for affirmative relief against his adversaries, be now heard to say that the court whose action he had him-

self invoked, had no jurisdiction to act in the matter, and
122 that he is estopped to question the right of the court to proceed in the determination of matters which he himself presented for adjudication. This being so, we will now proceed to determine what rights, if any, Whitaker may have in the premises.

The island in dispute and the shore lands now owned by McBride and Kilgore were formerly embraced in the "Fort Kearney military reservation." This was surveyed under the act of Congress of July 21, 1876. As heretofore stated, the surveyors were instructed by the Land Department of the General Government, having that matter in charge to survey no islands found in the Platte river not containing twenty-one acres or more. The island in dispute was not surveyed and McBride and Kilgore claim that it passed to them as purchasers of the shore land opposite, while Whitaker insists that the island contains and did contain at the time of the survey, more than twenty-one acres, but it was not surveyed because of mistake or fraud on the part of the Government surveyor, that it is still Government land, and that he has a right to enter on the same and to claim it, and hold possession under the homestead laws of the United States.

The Government plat of the survey shows that the north line of McBride's land and the south line of the land of Kilgore opposite this island are bounded by the river bank as indicated by a meandered line following along the bank of the stream as shown upon
the plat. One of the chainmen who assisted in making the
123 Government survey is positive in his testimony that no meandered lines along the river bank were actually run by the surveyor, leaving us to understand that the meandered lines shown by the plat were traced thereon by the surveyor, not from any survey made, but according to his idea of the windings of the river gained from observation alone. That this was the fact is further established by an actual survey made from the field notes of the original survey which discloses that the meandered lines of the lands of McBride and Kilgore are in some places opposite this island some distance back from the river bank, leaving quite a body of land between the meandered lines and the shore.

It is insisted that the rule in this State is firmly established, that it may be shown by evidence outside and independent of the Government plat of the survey, that there was unsurveyed land left between the meandered line of a grantee from the Government and the river bank to which he claims and that if this fact is established, he has no claim to the lands lying between the meandered line and the bank, even though the Government plat of the survey shows the meandered line to extend along the bank and the grant was made with reference thereto. The following cases are referred to as supporting this doctrine: Lammers *v.* Nissen, 4 Nebr., 245; Bissel *v.* Fletcher, 19 Nebr., 725; Bissel *v.* Fletcher, 27 Nebr., 582; Harrison *v.* Stipes, 34 Nebr., 431.

We have examined these cases with great interest and we are un-

able to see any analogy between the two first cited, and the
124 case at bar, nor do we think that it was the intention of this court in the decision of these two cases to establish the rule that one claiming no title or right derived from the United States, a naked trespasser, could question or contradict the correctness of an approved plat of a Government survey of public lands.

Before examining these cases and the facts involved, it will be well to examine the rule established by the Supreme Court of the United States relating to the force of an approved plat of a Government survey as evidence. In West *v.* Cochran, 58 U. S. the Court said:

"It has often been held by this court that the judicial tribunals in the ordinary administration of justice, had no jurisdiction or power to deal with these incipient claims, either as to fixing boundaries by survey, or for any other purpose; but that claimants were compelled to rely upon Congress, on which power was conferred by the Constitution to dispose of and make all needful rules and regulations respecting the territory of the United States. Among these needful regulations was that of providing that these unlocated claims should be surveyed by lawful authority; a consideration that has occupied a prominent place in the legislation of Congress from an early day."

In Knight *v.* United Land Ass'n, 142 U. S., 161, the court said: "It is a well settled rule of law that the power to make and correct surveys of public lands, belongs exclusively to the political
125 department of the Government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding."

In Cragin *v.* Powell, 128 U. S., 691, is the following: "That the power to make and correct surveys of the public lands belongs to the political department of the Government, and that, whilst the lands are subjected to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

A large number of cases are cited by the court in support of this rule.

Judge Datron in Haydel *v.* Dufresne, 17 How., 23, gives the reason for this rule in the following language: "That great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and division more equitably made than the department of public lands could do."

Justice Bradley in Mitchell *v.* Smale, 140 U. S., 406, discusses the

question of what passes to the grantee of a tract bounded by
126 a meandered line and the right of the Government to correct its surveys in the following language: "Our general views with regard to the effect of patents granted for lands around the margin of a non-navigable lake, and shown by the plat referred to therein, to bind on the lake, were expressed in the preceding case of Hardin *v.* Jordan, and need not be repeated here. We think it a great hardship, and one not to be endured, for the Government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented to be so. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. The pretence for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases exist. The difficulty of following the edge or margin of such pro-
127 jections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deducted therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the Government would have the right to recall the survey, and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be
128 portrayed. Such mistakes, of course, do not bind the Government. Nor do we mean to say that, in granting lands bor-

dering on a non-navigable lake or stream, the authorities might not formerly, by expressly words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein, this can not be done."

It will be seen from these cases that in the Federal courts, at least, the plat of a Government survey, after having been approved by the Land Department is in an action between individuals conclusive. If such a plat shows a meander line running along the bank of a stream, this is conclusive that the stream is the boundary line and no evidence will be received tending to show that a mistake had been made in the survey and that a body of unsurveyed land was left between the meander line and the bank.

It is claimed, however, that Lammers *v.* Nissen, 4 Nebr., 24, establishes a different rule in this State. We do not think so, and an examination of the facts will show that there is nothing inconsistent with the holding of this court in that case and the holding of the Supreme Court of the United States in the cases above cited.

What were the facts? In 1861, Lammers entered at the United States Land Office lot one, in section twelve, township thirty-three, range one, and received a patent therefor. The plat of the
129 original survey of this lot shows that it was bounded by the bank of the Missouri river, and he claimed title to the river bank, and brought his action in equity to restrain the defendants from cutting timber on land lying between the meander line of his lot and the river bank to which he made claim as accretions to his land. The evidence established that at the time the survey was made, from eight hundred to one thousand acres lay between the meander line of the plaintiff's lot and the bank of the Missouri river which was left unsurveyed. This apparently arose from the surveyor mistaking a slough for a channel of the river. When the attention of the officers of the Land Department of the General Government was called to this unsurveyed land, a survey was ordered and made, and the Government sold the land to the defendants who produced patents therefor. Upon those facts the findings were for the defendants and this court *said*: "Although as to public lands of the United States, a meander line is generally considered as following the windings of a stream, yet the question whether it does so or not may be determined by evidence *aliunde*. The mere fact that it is run and designated upon the plat as a meandered line is not conclusive as against the Government."

The holding went only to establish that the Government itself was not concluded by the lines established by its surveyors, and that in an action brought by a purchaser, claiming that his grant brought
him to the bank of a river, the Government or a purchaser
130 claiming by grant from the Government may show, not merely that the survey and plat under which the plaintiff claimed was incorrect, but that the Government had through its

proper officers assented title to the land claimed by the plaintiff, had the same surveyed and platted, and granted them by letters patent to the defendants. As we read and understand the opinion it only holds that the Government may correct mistakes of its surveyors, and that an approved plat of the survey of public lands does not conclude the Government in a contest between it and a purchaser who bought with reference to the plat.

Bissell *v.* Fletcher, 19 Nebr., 245; was a case of the same character. In the first report of the case the fact that the defendant claimed title to the land in controversy by purchase from the United States is not made clearly to appear, but this is made plain by the statement of Judge Maxwell on the rehearing had in the case and reported in the 27th Nebraska. The statement is as follows: "The matter in dispute is the boundaries of lot three, section thirty-one, township two, range eighteen, in Harlan county. This lot is shown by the plat and patent under which the plaintiff claims to contain 52 60/100 acres. This amount of land he is in the undisputed possession of, but he claims that he is also entitled to a large quantity of land as an accretion, but which the United States has caused to be surveyed and sold to the defendants or their grantors, so that the question in controversy is between two persons who have pur-
131 chased and paid for distinct tracts of land from the United States Government."

So far then, we have no case in this State, holding or intimating that a trespasser might enter on lands claimed by a purchaser from the United States, and shown by the plat of the survey to be covered by his patent and when proceeded against for such trespass, show in defense, that the Government plat is incorrect, and that the land claimed by the plaintiff is not in fact covered by his grant.

It was not until the case of Harrison *v.* Stipes, 34 Nebr., 431, that a case arose presenting these features and the statement of the case made by Judge Norval leaves us to doubt whether that case presented the precise question. Harrison, the plaintiff, brought ejectment to recover from the defendant certain lands which he claimed as accretions to a certain irregular forty. The defense interposed was that the land in dispute was not included in the meandered line of plaintiff's land, but lay between such line and the river. The following is Judge Noral's statement relating to what was shown by the plat of the survey: "It appears that said fractional section eight was surveyed by the United States in 1856. The east and south boundaries of the section consist of a meandered line near the west bank of the Missouri river." If this is an accurate statement of the case, then the question now under consideration did not arise in the case as the meandered line did not run along the river bank
132 making that bank the boundary line, but it was "near the bank, but how near or how far therefrom does not appear from anything in the statement or the opinion. If the meandered line did not extend to and along the river bank, it needs no argu-

ment to demonstrate that the plaintiff could not claim title to accretions formed by the river against the bank and that he should fail in his action.

But again, it is apparent from the opinion, that the court did not intend to establish a rule differing from that announced in Lammes *v.* Nissen and Bissell *v.* Fletcher In the opinion it is said: "The plaintiff's claim to any portion of the strip lying between the meandered line and the present channel of the river is not well founded for the reason that it is not an accretion to the plaintiff's land. The case falls within the rule announced in Lammers *v.* Nissen, 4 Nebr., 245."

In the fact that the defendant, Stipes, was not claiming title to the land occupied by him by title derived from the United States, the case does not come within the facts shown in Lammers *v.* Nissen, and if it falls within the rule of that case, it must be only because the plat of the survey showed upon its face that the meandered line did not extend along the river bank, and that the river bank was not the plaintiff's boundary line.

This court has not committed itself to the doctrine that one without claim of legal title may enter on land shown by the Govern-
133 ment plat of the survey to be included in a tract patented by the Government to another, and hold possession thereof as against the party claiming under the patent upon a showing that the plat of the Government survey was incorrect, and that an accurate survey would not include the land. We are not advised of any case in this State or elsewhere, which allows the Government plat to be contradicted or impeached except in a direct proceeding brought for that purpose, and the reasons for the rule are so many and important that no departure therefrom ought to be allowed.

In the present instant the record discloses that Whitaker made application to the Land Department of the General Goverment for a survey of this island, and was informed by the Commissioner of the Land Office in a communication under date of May 26, 1897, that the department had caused an investigation to be made in 1895, relating to the rights of the Government to this island and some others in the vicinity, and had determined that the islands were connected with land which had previously been surveyed and disposed of by the Government, and that the Secretary of the Interior in his letter of February 18, 1895, concurred in the recommendation of the Commissioner that no further action looking to the survey of any of the alleged islands be taken.

The Government has investigated and disclaimed any interest in the island, giving as a reason therefor that it had conveyed its title; and there can be no question of doubt that as between the
134 claims of Whitaker and of McBride and Kilgore, the latter have a right to have their title quieted as against his demand.

We do not wish to be understood as undertaking in this opinion to determine the rights of any one except the parties to the record,

or to have the impression go out that any claims of the State to the bed of the Platte river or to any unsurveyed islands therein are intended to be affected in any manner by what has been said.

We have only aimed to settle the rights of the parties as among themselves, and if the State should hereafter present any claim of ownership to the bed of the river, we desire to be left free to determine the question as the merits of the case may demand and without reference to anything that may have been said in the foregoing opinion.

It is settled by the decisions of the Supreme Court of the United States that a grant by the General Government of public lands bounded on streams releases the Government title to the middle of the stream unless some reservation is contained in the grant, but whether the title enures to the State in which the land lies or to the grantee of the Government, depends upon the law of the State. Hardin *v.* Jordan, 140 U. S., 371.

As the question of the rights of the State has not been presented in this case, we reserve that question until a case arises in which we may have the benefit of the argument of counsel, it being one of too much importance to be determined without a full discussion.

135 That as against every one but the State, or those claiming through the State, McBride and Kilgore have the better right to the land in dispute, seems to us too plain for discussion and that they are entitled to relief as against Whitaker, a naked trespasser on their prior undisputed and peaceable possession, is not a question for debate.

We recommend that the decree of the district court be reversed and the case remanded with directions to enter a decree quieting the title to the north half of the island in dispute in the defendant Kilgore and to the south half thereof in the plaintiff, McBride.

Albert, C., and Ames, C. concur.

By the COURT: The conclusion reached by the commissioners is approved, and it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the decree of the district court be reversed and the cause remanded with directions to enter a decree quieting the title to the north half of the island in dispute in the defendant Kilgore, and to the south half thereof in the plaintiff, McBride.

136 And afterward, to-wit, on the 12th day of July, A. D. 1902, there was filed in the office of the clerk of the supreme court a certain motion for rehearing in the words and figures following, to-wit:

THOMAS MCBRIDE ET AL., Appellants, v. GEORGE S. WHITAKER, Appellee. } Gen. No. 11090. Motion for a Rehearing.

The appellee, George S. Whitaker, moves the court for a rehearing in this case for the following reasons, to-wit:

I.

Because the opinion filed in this case is based upon the law of riparian ownership, while the facts presented by the record do not show the lines in dispute to be on the bank of any stream and the land in dispute is not an island; hence there are no facts upon which the opinion can stand.

II.

Because the opinion shows that it was based on an entire misunderstanding of the facts.

III.

Because that the opinion filed in this case does not decide or state what the law is governing the facts presented.

IV.

Because the only question for this court to pass upon is—
137 can a grantee of the Government cross a line established by the Government without regard to a stream simply because it is not a straight line and under his grant hold land beyond such boundary line?

—.

Because the petition states no ground for equitable relief. The appellee, Whitaker, made objection to it for that reason in every conceivable way in the court below. Neither his answer nor the answer of any defendant could give the court jurisdiction.

VI.

A rehearing should be granted for the reason that the opinion assumes that the defendant Whitaker may be ousted from his possession by two persons who are conceded by the opinion not to be the owners of the land in question as the opinion does not undertake to say that the legal title to the land is not in the United States. If the legal title to the land is in the United States then only the United States can put Whitaker off the land.

VII.

A rehearing should be granted because the opinion does not determine who is the lawful owner of the land and without determin-

ing that fact provides for a judgment of ouster against Whitaker. Now, neither McBride nor Kilgore can allege a title superior to the real defendant Whitaker against whom they conspire and against whom they are attempted to operate as a pair of scissors. Before they could recover against Whitaker in an action of ejectment they would be compelled to establish their superior title. If they obtained the superior title it was from the United States, and
138 the opinion expressly holds that they have acquired no title from the United States. It follows as a legitimate consequence that they have no title and therefore that they should not recover.

VIII.

There should be a rehearing because under the opinion it is not determined that the United States ever parted with its title to the land in controversy, and it is expressly determined that a controversy in the United States Land Office to obtain title to the land may still be maintained.

IX.

A rehearing should be granted because McBride and Kilgore have together conspired to avoid the usual form of judicial procedure and have substituted an action to quiet title in place of an action of ejectment and have deceived this court by their pretended hostility to each other, so that it has overlooked the fact that the stipulation of McBride and Kilgore to confer jurisdiction ought not to stipulate the real defendant Whitaker out of his constitutional right to a trial under the usual forms of law and to a hearing before a jury.

X.

A rehearing should be granted because the United States held the land in question for the purpose of settlement and Whitaker settled on the land, and now, without determining that the United States intended to part with its title to the land and without determining that the United States is unwilling to permit Whitaker's occupation and settlement, the opinion ousts Whitaker from the possession of the land and thereby defeats the purpose of the United States and the object of the law of Congress.

139 XI.

A rehearing should be granted because Whitaker, as a citizen of the United States, had a right to settle upon the land and as a citizen of the United States he had a right to have the rules pertaining to the Government survey enforced.

FRANK E. BEEMAN,
FRED A. NYE, AND
F. G. HAMER, *Attorneys for Appellee.*
GEORGE S. WHITAKER, *Appellee.*

Endorsed: 11090. In the supreme court of Nebraska. Thomas McBride, *et al.*, appellants, *v.* George S. Whitaker, appellee. Motion for a rehearing. Supreme court of Nebraska. Filed July 12, 1902. Lee Herdman, clerk. 10/9/02. Denied.

And afterward, to-wit, on the 14th day of July, A. D. 1902, there was filed in the office of the clerk of said supreme court a further and supplemental motion for rehearing, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

THOMAS MCBRIDE ET AL., Appellants, *v.* GEORGE S. WHITAKER, Appellee. } Gen. No. 11090. Supplemental Motion for a Rehearing.

Comes now the appellee, George S. Whitaker, and moves
140 the court for a rehearing for the following additional reasons, to-wit:

I.

Whitaker is not estopped to deny jurisdiction by his answer. He objects to the jurisdiction, as he had a right to, but if the court over his objection to the jurisdiction will assume it, he has a right to ask the court to decide in his favor. This was all he did.

II.

A rehearing should be granted because the statement of the learned commissioner who delivered the opinion that "the fact that the plaintiff McBride and the defendant Kilgore each claim ownership of a part of the land in dispute but can not agree upon a division to be made thereof, does not in our opinion present any matter for the equitable interference of the court," is a statement of the law and the action should have been dismissed by this court. The judgment of the district court dismissing the action was right.

III.

A rehearing should be granted because the facts found by the district court are not controverted by the learned commissioner who delivered the opinion. The effect of his opinion is that a right may be founded upon a disregard of duty and that such right may be taken from one who ought to be entitled to it and given to one who ought not to be entitled to it and that the United States may thereby be deprived of distributing its own lands among its own citizens according to the laws of Congress and the merits of
141 their respective claims.

IV.

A rehearing should be granted because the facts and the law are both as they were found by the trial court.

F. E. BEEMAN,
FRED A. NYE, AND
HAMER & HAMER,
Attorneys for Appellee.

Endorsed: 11090. Supreme court, State of Nebraska. Thomas McBride, *et al.*, appellants, *v.* George S. Whitaker, appellee. Supplemental motion for a rehearing. Supreme court of Nebraska. Filed Jul- 14, 1902. Lee Herdman, clerk.

And afterward, to-wit, on the 9th day of October, A. D., 1902, there was rendered by said court and entered of record upon the journal thereof, a certain judgment in the words and figures following, to-wit:

THOMAS MCBRIDE, Appellant, *v.* GEORGE W. WHITAKER ET AL., Appellees; William H. Kilgore *et al.*, Appellants.	No. 11090. Appeal from the District Court of Buffalo County.

This cause came on to be heard upon a motion by the appellees for a rehearing herein, on consideration whereof by the court, it is ordered that said motion be and the same hereby is overruled and a rehearing denied.

And afterward, to-wit on the 13th day of October, A. D., 1902, there was filed in the office of the clerk of said supreme
142 court a certain præcipe in the words and figures following, to-wit:

Hon. Lee Herdman, Lincoln, Nebr.

DEAR SIR: Please forward mandate in McBride *vs.* Whitaker at earliest possible date, as we desire to take action next week when court here is in session.

Truly yours, J. M. EASTERLING.

Endorsed: 11090. McBride *v.* Whitaker. Præcipe. Supreme court of Nebraska Filed Oct. 13 1902. Lee Herdman, clerk.

And on the same day there was made to issue out of the said supreme court a certain mandate in the words and figures following, to-wit:

143 In the Supreme Court of the State of Nebraska, Sitting at Lincoln, September Term, 1902.

To the district court of the twelfth judicial district, sitting in and for the county of Buffalo, Greeting:

Whereas in a late action before you wherein Thomas McBride was plaintiff and George W. Whitaker and —— Whitaker, his wife, and William H. Kilgore and —— Kilgore, his wife, were defendants, you rendered a judgment in said cause, upon a transcript of which record and proceedings in your said court, the said plaintiff and the said defendants, Willliam H. Kilgore and —— Kilgore, his wife, prosecuted an appeal to the supreme court of the State of Nebraska, upon a trial of which cause in said supreme court, during the January term, A. D. 1902, it was considered by said court that the judgment rendered by you in said cause be reversed at the cost of said defendant George W. Whitaker and —— Whitaker, his wife, taxed at $62.30, and cause remanded with instructions to you the said district court to enter a decree in said cause in your said court, quieting the title to the north half of the island in dispute in said action in the defendants Kilgore and to the south half thereof in the plaintiff McBride.

Now therefore you are commanded, without delay, to proceed to carry into effect the said judgment of our said supreme court in the manner provided by law. Said judgment more fully appears in an opinion filed in said cause, a certified copy whereof is attached hereto and made a part hereof. (Copy of opinion here referred to may be found on pages 111 to 135 inclusive, of this record. Lee Herdman, clerk. Oct. 19, 1903.)

Witness, the Hon. J. J. Sullivan, chief justice, and the seal of said court, at Lincoln, this 13th day of October, 1902.

[SEAL.] LEE HERDMAN, *Clerk*.
By E. W. NELSON, *Deputy*.

144 And afterward, to-wit, on the 6th day of November, A. D., 1902, there was rendered by said court and entered of record upon the journal thereof, a certain order in the words and figures following, to-wit:

THOMAS MCBRIDE *v.* GEORGE W. WHITAKER ET AL., Appellees; WILLIAM H. Kilgore *et al.*, Appellants.	No. 11090. Appeal from the District Court of Buffalo County

Upon the application of Francis G. Hamer, attorney, it is by the court ordered that he have leave to file his motion for a hearing herein and to file his briefs in support thereof on or before November 18, 1902.

And afterward, to-wit, on the 7th day of April, A. D., 1903, there was rendered by said court and entered of record upon the journal thereof, a certain order in the words and figures following, to-wit:

THOMAS MCBRIDE, Appellant, v. GEORGE W. WHITAKER ET UX., Appellees, Impleaded with William H. Kilgore *et ux.*, Appellants.	No. 11090. Appeal from the District Court of Buffalo County.

Upon application of the appellees herein, it is by the court ordered that the mandate heretofore issued and transmitted to the district court of Buffalo county, Nebraska, be and is hereby recalled and held for naught, to remain in this court until the further order of this court.

145 And afterward, to-wit, on the 3rd day of June, A. D., 1903, there was rendered by said court and entered of record upon the journal thereof a certain judgment in the words and figures following, to-wit:

THOMAS MCBRIDE, Appellant, v. GEORGE WHITAKER ET US., Appellees, Impleaded with William H. Kilgore *et ux.*, Appellants.	No. 11090. Appeal from the District Court of Buffalo County.

This cause came on to be heard upon a motion by the appellee for a rehearing herein, on consideration whereof by the court, it is ordered that said motion be and the same hereby is overruled and a rehearing denied. And, it appearing to the court that the mandate of this court, issued October 12, 1902, was by order of this court recalled on April 7, 1903, it is ordered that said order of April 7, 1903, be now vacated and set aside and that said mandate be and remain in full force and effect, and that a proper certificate issue from this court to carry into effect this judgment and the judgment set forth in the said mandate.

146 And afterward, to-wit, on the 4th day of June, A. D., 1903, there was filed in the office of the clerk of said supreme court a certain motion in the words and figures following, to-wit:

147 In the Supreme Court of the State of Nebraska.

THOMAS MCBRIDE v. GEORGE W. WHITAKER.	No. 11090. Motion.

Now comes the appellee Whitaker and moves the court here as follows:

I.

To so far modify the opinion as to declare that as between McBride and Kilgore of the one side and Whitaker of the other side the land in controversy is not adjudged to be the property of McBride and Kilgore and that there is no intention to declare that the title of the United States was ever divested or its ownership and control surrendered.

II.

That no mandate shall be sent to the district court of Buffalo county directing a judgment to be rendered against Whitaker which shall oust him from the possession of the land pending his application to the General Land Office of the United States for leave to make a homestead entry of the same. In support of this application appellee refers to copies of the papers filed by him in the United States land office at Lincoln, Nebraska, and states that he has applied to the General Land Office of the United States to have the land surveyed and to make a homestead entry of the same and that he is a citizen of the United States and of the State of Nebraska and qualified to make such entry and that he resides on said land with his wife and children and that he has made valuable
148 improvements thereon.

HAMER & HAMER,
Att'ys for Whitaker.

Endorsed: 11090. Thomas McBride *v.* George W. Whitaker. Motion to modify opinion and to determine the provisions of the mandate. Supreme court of Nebraska. Filed June 4 1903. Lee Herdman, clerk. 6/18/03 Overruled.

And afterward, to wit, on the 18th day of June, A. D., 1903, there was rendered by said supreme court and entered of record upon the journal thereof, a certain judgment in the words and figures following, to wit:

THOMAS MCBRIDE *v.* GEORGE W. WHITAKER *et al.*, Appellees; WILLIAM H. KILGORE et al., Appellants.	No. 11090. Appeal from the District Court of Buffalo County.

This cause came on to be heard upon a motion by the appellees for an order to modify the opinion and to determine the provisions of the mandate, on consideration whereof by the court, it is ordered that said motion be and the same hereby is denied.

149 And afterward, to wit, on the 20th day of June, A. D., 1903, there was made to issue out of said court a certain certificate-mandate in the words and figures following, to wit:

150 In the Supreme Court of the State of Nebraska, Sitting at Lincoln, January Term, 1903.

To the district court of the twelfth judicial district, sitting in and for the county of Buffalo, Greeting:

Whereas in a late action before you wherein Thomas McBride was plaintiff and George Whitaker *et al.* were defendants, you rendered a judgment, upon a transcript of which record and proceedings in your said court, the said Thomas McBride and William H. Kilgore, *et ux.*, prosecuted an appeal to the supreme court of the State of Nebraska, wherein, upon a trial of said cause, during the January term, 1902, a judgment was rendered; and

Whereas, on October 13, 1902, a mandate was issued and transmitted to your court advising you of the said judgment of our said supreme court, and directing further proceedings in said cause, in conformity therewith; and

Whereas the said supreme court, on April 7, 1903, recalled the said mandate, a certified copy of which order was filed in your said court; and

Whereas, the said supreme court, on June 3, 1903, vacated its said order recalling said mandate and directing that said mandate remain in full force and effect, and that proper certificate be issued to you concerning said matter;

Now, therefore, the said mandate, as issued out of the said supreme court on October 13, 1902, is hereby returned into your said court in full force and effect, and a certified copy of the order of our supreme court in that behalf is attached hereto and made a part of this certificate. The costs of said action in the supreme court, in the sum of $75.20, taxed against the said George W. Whitaker and —— Whitaker, his wife, are set out on the endorsement hereof, and said statement is to be treated as an amendatory statement to the cost statement in and on the said mandate.

Now, therefore, you are commanded, without delay, to proceed to carry into effect the said judgment of our said supreme court in the manner provided by law.

Witness, the Hon. J. J. Sullivan, chief justice, and the seal of said court, at Lincoln, this 20th day of June, 1903.

LEE HERDMAN, *Clerk*,
By E. W. NELSON, *Deputy*.

151 In the Supreme Court of the State of Nebraska, June 3, 1903.

THOMAS MCBRIDE, Appellant, *vs.* GEORGE WHITAKER ET UX., Appellees, Impleaded with William H. Kilgore *et ux.*, Appellants.	No. 11090. Appeal from the District Court of Buffalo County.

This cause came on to be heard upon a motion by the appellees for a hearing herein, on consideration whereof by the court it is ordered that said motion be and the same is hereby overruled and a rehearing denied. And, it appearing to the court that the mandate of this court, issued October 12, 1902, was by order of this court recalled on April 7, 1903, it is ordered that said order of April 7, 1903, be now vacated and set aside and that said mandate be and remain in full force and effect, and that a proper certificate issue from this court to carry into effect this judgment and the judgment set forth in the said mandate.

STATE OF NEBRASKA, *ss:*

I, Lee Herdman, clerk of the supreme court of said State, do hereby certify that the foregoing is a true and correct copy of an order made by said court on June 3, 1903, in an action then pending in said court wherein Thomas McBride, *et al.*, were appellants and George Whitaker, *et ux.* were appellees, as the same appears of record in my said office.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said court, at Lincoln, this 20th day of June, 1903.

LEE HERDMAN, *Clerk*,
By E. W. NELSON, *Deputy*.

152 And on the same day there was filed in the office of the clerk of said supreme court a certain motion in the words and figures following, to-wit :

153 In the Supreme Court of the State of Nebraska.

THOMAS MCBRIDE, Appellant,
vs.
GEORGE S. WHITAKER, Appellee; WILLIAM H. Kilgore, Impleaded with George S. Whitaker, also Appellant. } Gen. Number 11090.

Motion of Appellee for a Re-Trial and Finding and Judgment de Novo; also for a Re-Hearing and Order Declaring Contents of Mandate.

Now comes the appellee, George S. Whitaker, and moves the court here as follows:—

1st. For a re-trial in this court and a finding and judgment *de novo.*

2nd. For a re-hearing.

3rd. If that part of the motion for a re-trial and a finding and judgment *de novo* shall be overruled, as also that part for a re-hearing then the appellee further moves the court for an order defining and declaring the contents of any mandate that may be sent out to the district court of Buffalo county.

I.

The motion for a retrial and finding and judgment *de novo* is based upon the following grounds:—

(1.) While the case was pending on appeal in this court having been appealed from the judgment of the district court of Buffalo county by the appellants McBride and Kilgore, the legislature of the State of Nebraska passed an act providing that all cases appealed from the district court to the supreme court of that State, whether now pending or hereafter to be brought to said court, wherein a review of some or all of the findings of fact by the district court is asked by the appellant, it shall be the duty of the supreme court to re-try the issue, or issues of fact involved in the finding or findings of fact complained of, and upon the evidence preserved in the bill of exceptions, and upon such trial *de novo* to reach an independent conclusion and judgment without reference to the conclusion and judgment reached in the district court, or the fact that there may have been some evidence in support thereof. That an emergency clause was attached to the said act, and that said act was passed and took effect on the — day of —— 1903, and became a law
154 before this action and proceeding were determined, and ever since the passage of the said act the same has been the law of the State of Nebraska. That this court never retried the said case after the said act was passed, and became a law, and never made any finding of facts or law, but wholly overlooked and omitted

its duty in that regard. That it is the duty of the judges of this court to personally examine and consider the evidence in this case contained in the bill of exceptions, and sitting as a court, to retry the said case and to reach a separate conclusion and judgment upon the issues joined, as shown by the pleadings and the evidence contained in the bill of exceptions. That no such retrial was had, and no personal examination was made of either the pleadings or the evidence by the members of this court, and that it has made no findings of fact and that it is without jurisdiction to render any judgment in the premises. That the opinion in this case heretofore prepared by Commissioner Duffie is no longer applicable to the case under the said law passed as aforesaid by the legislature of Nebraska, and no longer applicable under the State Constitution and confers no jurisdiction to render any judgment or to issue any mandate.

(*b.*) That if this court shall examine the pleadings in this case it will find that the case was tried by McBride and Kilgore, (McBride as plaintiff and Kilgore as cross-petitioner) upon the theory that the land in controversy was an *accretion* to certain lots owned by them, and that the case was tried by the defendant Whitaker (who won in the district court and who is here the appellee) upon the theory that the land was Government land belonging to the public domain, and that he, Whitaker, was qualified to be a homestead-entryman, and that he was seeking to make a homestead entry of the land, and that the land was unsurveyed because of the mistake of the Government surveyors; that it ought to have been surveyed because it exceeded twenty-one acres in extent, and all islands exceeding twenty-one acres were directed to be surveyed, and that the statement of McBride and Kilgore that they were unable to agree as to where the line was between them stated no cause conferring jurisdiction upon a court of equity, and the fact that the land was Government land belonging to the public domain should prevent the State court from exercising control over it, and that it had no jurisdiction to
155 quiet title in McBride and Kilgore or any one else.

That if this court shall examine the evidence in this case contained in the bill of exceptions, it will find no testimony tending to show that the land in controveasy is an accretion to the lots occupied on one side by McBride and on the other side by Kilgore, and so must find that the case of McBride and Kilgore, as originally stated, has failed; and must further find that it was improper to allow McBride and Kilgore to change the character of their cause of action after the case was tried.

That if the court shall further examine the pleadings it will find that several months after the evidence was all introduced and after the case was closed, the pleadings of McBride and Kilgore were so amended that they wholly *abandoned* the *accretion* statement, and substituted in lieu thereof a statement to the effect that they each held as riparian proprietors owning land on the banks of the Platte river. That this proceeding was er-oneous and void.

A further examination of the evidence will show that whether

McBride and Kilgore owned the lots which they each claim to own, they were not riparian owners for the reason that they did not own land coming down to the shore of the Platte river. There is only one shore of a river, a lake or the sea, and that is on the *outside of it.* That is the point where the land on the outside comes down to the water and comes in contact with it. These men, McBride and Kilgore, claim to have owned land on the *inside* of the Platte river. On the *inside* of the water. They were therefore islanders. They were islanders claiming to own *other* islands. Therefore they were not riparian owners.

The evidence further shows that the tract in dispute is much longer than the lots claimed by McBride and Kilgore. It extended above their lots and below their lots. Also that the tract is traversed by *four* channels of the Plate river. Also that these channels are *inside channels.* If it were possible that an islander could be a riparian owner because of the island which he claims, then he can only own to the *centre of the stream next to his island.* He could cross two streams beyond the first stream. He could only go to the *middle of the first stream* That would be his limit.

The evidence tends to show the mistake of the surveyors. They should have surveyed these islands, but they did not. How
156 long these islands are we do not know, nor do we know how wide they are, except that we know that the tract claimed by Whitaker contains about *sixty acres.*

The trial judge who heard this case found the facts in favor of the appellee. This court cannot find otherwise if he finds according to the evidence. As yet this court has found nothing. We want the finding of this court. We want this court to find the facts as they are.

Shall this court set aside the finding and the judgment of the court below without making a finding and judgment of its own?

There is no evidence tending to show that McBride and Kilgore own the land, *because they own islands in the vicinity.*

Neither the plat nor the testimony of the witnesses outside of the plat attaches this land to the islands occupied by McBride and Kilgore, or either of them. Attaching the land in controversy to these islands cannot be accomplished by the doctrine of riparian rights, because that doctrine *crosses no channels.* It can only go to the center of the first channel.

The plaintiff and his companion cross-petitioner Kilgore failed to establish their ownership by the strength of their own title. Therefore their case fails. Will this court conclude and announce as a matter of law that the plaintiff can recover the possession of lands without doing so upon the *strength of his own title?* This court can find no evidence upon which to base the right of recovery of possession upon the part of Kilgore and McBride.

Does this court desire to find and announce that because Whitaker undertook to enter upon the land without the consent of McBride, he is therefore a trespasser and shall be denied the privilege of prov-

ing the truth? We believe the court will find and adjudge otherwise. The position of the learned Commissioner in the opinion which he wrote seems to be that Whitaker is a trespasser and therefore that he cannot be heard to make any defense and cannot be heard to allege the truth. We submit that this case ought to be reversed because of so astounding a doctrine. When was the State court delegated with the authority of determining the action of the Land Department of the United States?

II.

If, for any reason, this court shall decline to re-try the case and to make a finding and judgment *de novo*, then we submit that
157 it should grant a re-hearing. The opinion of the learned Commissioner is wrong.

(1.) It forbids Whitaker to raise the question that the land belongs to the United States and that it has not been surveyed, and that it is subject to homestead entry, and that he, Whitaker, is a qualified homestead-entryman, and has made application to have the land surveyed and to make a homestead entry of it. The opinion holds that the title to the land is yet in the United States, and that there is no intention to render a judgment which shall prevent a future grantee of the Government from owning the land; yet the opinion attempts to bar Whitaker, and forbids him to raise the questions above set forth upon the ground that he is a trespasser. This is an invasion of the department of the General Government. It is in violation of that part of the Constitution of the United States which provides that property may not be taken without due process of law. For the same reason it violates the State constitution. It is in defiance of the acts of Congress.

(2.) Judge Sullivan, or the district court, before whom the case was tried, determined all these questions in Whitaker's favor. Judge Duffie says that Whitaker cannot be heard to tell the truth. When did it become the duty of the State court to protect the fences of the cattle men in violation of congressional enactments, and in violation of the homestead law.

(3.) What right has the State court to pick Whitaker out from among all the citizens of the United States and to say that he is not eligible to become a homestead-entryman under the laws of the United States.

(4.) The action was to quiet title. McBride alleged that he was entitled to the land because he was a riparian proprietor owning land which came down to the shore. Kilgore alleged that he was similarly situated. They describe the land occupied by Whitaker as a single island. They represented that they owned to the centre of the stream and consequently they claimed that they owned to the centre of the island. They claimed that they were unable to agree upon the line dividing the island between them. The learned commissioner professed to be shocked at the idea that such a petition

and such an answer constituted an equitable action. And yet he took the jurisdiction *just the same.*

(5.) Judge Duffie in the opinion says that Whitaker invokes the jurisdiction of the court. He objected to the jurisdiction of
158 the court upon the ground that the land belonged to the public domain. He objected, second, that the facts stated did not constitute a cause conferring equity jurisdiction.

(6.) Counsel have not been permitted to argue the new doctrine sought to be fixed upon us by the opinion in this case. Up to this case there is no decision that the land under the water in a meandered stream belongs to the riparian proprietor. We should be heard at least once before this doctrine is announced.

(7.) The opinion of the Commissioner is wrong because it assumes that the land belongs to McBride and Kilgore in the absence of any evidence upon the question. It makes this finding while it concedes that the title to the land is yet in the Government. This is a judgment and at the same time it is no judgment. It ought to be either a judgment against Whitaker or in favor of him. Seemingly it is neither. We venture that the parallel of this opinion as to its effect cannot be found in any written decision in the books. We challenge counsel for McBride and Kilgore to find just one such case.

(8.) As long as Lammers *vs.* Nissen, 4 Nebraska, 245, declares the law of this State, it is illegal for McBride and Kilgore to own any part of the island in controversy. If this court proposes to overrule that case, and also Bissell *vs.* Fletcher, 19 Neb. 725, and Harrison *vs.* Stipes, 34 Neb. 431, it should say so, and it should say so in an opinion.

(9.) If it is the purpose of this court to prevent Whitaker from procuring this land to be surveyed and from putting a homestead entry upon it, it should say so.

(10.) The effect of what McBride and Kilgore did, put in force by the learned Commissioner, is to prevent Whitaker from having a trial by jury. If the facts that make a law action confer equity jurisdiction, then they are right, otherwise they are wrong.

(11.) We know of no rule that permits negative evidence to establish affirmative facts. That sort of nonsence may be put in a sophistical syllogism, but it is not found in a law book as we believe. There is supposed to be some sense in the law as well as in other things.

(12.) The opinion of the learned Commissioner should be set aside because among other things he said, in the face of all the pleadings and the evidence, that, " It is not insisted that a mistake
159 was made by the surveyor and that the island contained a sufficient quantity of land to require it to be surveyed."

(13.) The opinion should be set aside because the tract in controversy is among lands that have been thrown open to public settlement. The effect of the opinion would seem to be that a mistake made on the part of the Government surveyor shall thwart the intention of the Government in distributing its public lands and can be made to prevent such distribution under the homestead laws and

can prevent qualified homestead entrymen from obtaining their rights. The opinion offers a premium for mistakes or a prize for dishonesty.

(14.) The opinion should be set aside because in effect it authorizes the doctrine of riparian rights to cross six channels of a river as also the intervening islands.

(15.) The opinion should be set aside, because it changes the rule that the plaintiff should recover on the strength of his own title. It enables the plaintiff to recover without any title and without any strength.

(16.) The opinion should be set aside because it agrees with Judge Sullivan of the district court that the land is unsurveyed land and that it actually belongs to the Government and that the Government may assert its title to it at any time and yet it attempts to give the land to Kilgore and McBride and says that they are to be protected as against Whitaker.

(17.) The opinion should be set aside because the common-law rule cannot be applied to Kilgore and McBride because neither of them own any shore land.

(18.) The opinion should be set aside for the reason that the common law of England, if applied to a set of facts in Nebraska, should not be the common law of Nebraska, unless the facts in Nebraska are the same as they are in England.

(19.) The opinion should be set aside for the reason that we have inherited and adopted the Englishman's good taste and good sense and we should apply both to the same sets of facts to which the Englishman has applied them; but the Englishman has no Platte river, and he never contemplated by the adoption of the rule
160 concerning the right of the riparian owner to hold to the thread of the channel, that thereby hundreds of acres could be conveyed to a grantee not within the contemplation of the grantor.

III.

If the court shall overrule the first and second parts of this motion, which we can hardly contemplate as probable, then we move the court to so define and declare the form and conditions of any mandate that may be sent out, as that the possession of Whitaker may not be interfered with so long as he is claiming any right to homestead the land under the Government homestead laws, and so long as his application is pending before the Land Department of the United States. It is no part of the duty of this court to attempt to run the land offices of the United States, or to attempt to interfere with the right of any citizen who shall attempt to avail himself of the provisions of the United States homestead laws.

HAMER & HAMER,
Attorneys for Appellee George S. Whitaker.

(Endorsed:) Supreme court of Nebraska. Filed June 19, 1903. Lee Herdman, clerk.

161 And afterward, to wit, on the 2nd day of July, A. D., 1903, there was filed in the office of the clerk of said supreme court a certain motion in the words and figures following, to wit:

In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
v.
GEORGE S. WHITAKER ET AL., Defendants. } Motion.

Now comes the defendant, George S. Whitaker and represents to this court that he has served counsel for Thomas McBride and William H. Kilgore with a notice for a re-trial of this case in the supreme court of Nebraska, and a notice of an application for a re-hearing, and also a notice for an application to the supreme court for an order defining and declaring the contents of any mandate that may be sent out to the district court of Buffalo county. The notice served is in the words and figures following:

In the Supreme Court of the State of Nebraska.

THOMAS MCBRIDE, Appellant,
vs.
GEORGE S. WHITAKER, Appellee; WILLIAM H. KILGORE, Impleaded with George S. Whitaker, also Appellant. } Notice.

The said Thomas McBride and William H. Kilgore will take notice that on the 19th day of June, 1903, the appellee, George S. Whitaker, filed in the office of the clerk of the supreme court
162 of the State of Nebraska, a motion:

1st. For a retrial in this court and a finding and judgment *de novo*.

2nd. For a rehearing.

3rd. If that part of the motion for a retrial and a finding and judgment *de novo* shall be overruled, as also that part for a rehearing, then the appellee further moves the court for an order defining and declaring the contents of any mandate that may be sent out to the district court of Buffalo county.

Said motion will be heard in the supreme court room at Lincoln, Nebraska, on the 2nd day of July, 1903, at 10 o'clock in the forenoon, or as soon thereafter as said court may be willing to hear the same.

HAMER & HAMER,
Att'ys for Appellee George S. Whitaker.

Received a copy of this notice this 22nd day of June, 1903.
H. M. SINCLAIR,
Attorney for Plaintiff.
E. C. CALKINS,
Att'y for W. H. Kilgore.

Copies of the amended motion and affidavits upon which the said hearing in the supreme court will be had are hereto attached. Under the showing here made the defendant, George S. Whitaker,
163 objects to any judgment being rendered by this court until the said motion in the supreme court is heard and disposed of.

Defendant objects for the reason-:

1st. A retrial in the supreme court and judgment *de novo* have not been had.

2nd. There was no jurisdiction in the supreme court to make any final order of judgment.

3rd. The re-hearing applied for ought to be granted.

4th. The supreme court should specifically declare the contents of the mandate.

5th. Under the law Whitaker, the defendant, acquired new rights from the Government of the United States on the 13th day of April, 1903, which entitle him to the possession of the land and by reason of the facts he is the owner of the land as against McBride and Kilgore.

HAMER & HAMER,
Att'ys for George S. Whitaker.

Endorsed: Gen. No. 11090. Thomas McBride, appellant, *v.* Geo. W. Whitaker, *et al.*, appellees. Notice of motion for retrial and finding and judgment in supreme court. Also for rehearing and to define mandate. Affidavit of Fred A. Nye and Frank E. Beeman in support of motion and to declare judgment void. Also exhibits. Supreme court of Nebraska Filed Jul- 2 1903. Lee Herdman, clerk. Fred A. Nye, Frank E. Beeman and Hamer & Hamer, att'ys for George W. Whitaker.

164 In the Supreme Court of the State of Nebraska.

THOMAS MCBRIDE, Appellant,
v.
GEORGE S. WHITAKER, Appellee; WILLIAM H. KILGORE, Impleaded with George S. Whitaker, also Appellant. } Notice.

The said Thomas McBride and William H. Kilgore will take notice that on the 19th day of June, 1903, the appellee George S. Whitaker filed in the office of the clerk of the supreme court of the State of Nebraska a motion.

1st. For a retrial in this court and a finding and judgment *de novo*.

2nd. For a rehearing.

3rd. If that part of the motion for a retrial and a finding and judgment *de novo* shall be overruled, as also that part for a rehearing, then the appellee further moves the court for an order defining and declaring the contents of any mandate that may be sent out to the district court of Buffalo county.

Said motion will be heard in the supreme court room at Lincoln, Nebraska, on the 2nd day of July, 1903, at 10 o'clock in the forenoon or as soon thereafter as said court may be willing to hear the same.

HAMER & HAMER,
Att'ys for Appellee George S. Whitaker.

165 Received a copy of this notice this 22nd day of June, 1903.

H. M. SULLIVAN,
Attorney for Plaintiff.
E. C. CALKINS,
Attorney for W. H. Kilgore.

And after-ward, to-wit, on the 3rd day of July, there was rendered by said cour tand entered of record upon the journal thereof a certain judgment in the words and figures following, to-wit:

THOMAS MCBRIDE *v.* GEORGE S. WHITAKER ET AL., Appellees; William H. Kilgore *et al.*, Appellants.	No. 11090. Appeal from the District Court of Buffalo County.

This cause came on to be heard upon a motion by the appellees to recall the mandate and for a modification of the judgment heretofore entered, on consideration whereof by the court, it is ordered that said motion be and the same hereby is denied.

166 And afterward, to-wit, on the 25th day of August, A. D. 1903, there was filed in said supreme court in an action docketed in said court on that day wherein Thomas McBride was appellee, and George S. Whitaker and Mary I. Whitaker, his wife, were appellants, impleaded with William H. Kilgore, *et ux.*, appellees, known as cause No. 13383, a transcript of the record and proceedings in the district court of Buffalo county, Nebraska, on a trial in said court between said parties subsequent to the issuance and filing of the certificate mandate of this court in the cause known in said supreme court as McBride *v.* Whitaker, *et al.*, No. 11090, which is fully set out in this record, which said "certificate-mandate" is to be found on pages 150 to 151, inclusive, of this record, — which transcript contains among other things a certain judgment rendered by the said district court of Buffalo county on the 22nd day of June, 1903, and a certain certificate of the clerk of said district court of Buffalo county, which judgment and certificate are in the words and figures following, to-wit:

167 At a session of the district court continued and held pursuant to adjournment at the court house in the city of Kearney, county of Buffalo, and State of Nebraska, on the 22nd day of June, 1903, the Honorable Charles L. Gutterson being present and

presiding in said court, the following, among other proceedings, were had and done, to wit:

THOMAS MCBRIDE, Plaintiff,
vs.
GEORGE S. WHITAKER, —— WHITAKER, His Wife, and William H. Kilgore, Defendants. } Journal Entry.

This cause came on to be heard upon the motion of the defendant George S. Whitaker objecting to the rendition of any judgment until the motion pending in the supreme court upon the part of the said George S. Whitaker shall have been heard and determined, which was overruled and to which ruling of the court the defendant excepted.

And this cause coming on to be heard upon the motion of the plaintiff and the defendant Kilgore for judgment on the mandate of the supreme court on file herein, and it appearing from said mandate that upon the trial of this cause in the supreme court during the January term, A. D. 1902, it was considered by said court in said cause that the judgment heretofore rendered by this court in said cause be reversed at the costs of the said defendant George W. Whitaker and —— Whitaker his wife, taxed at seventy-five and 20/100 dollars, and said cause remanded with instructions to this court to enter decree in said cause quieting the title to the north half of the island in dispute in said action, in the defendant Kilgore, and the south half thereof in the plaintiff McBride.

It is therefore ordered, adjudged and decreed that the title and possession of the plaintiff Thomas McBride to all and singular the south half of the island in Mosquito channel of the Platte river in section twelve township eight north, range fifteen west, Buffalo county, Nebraska, described in the plaintiff's petition, the same being the premises now occupied by said defendant Whitaker, be and the same are hereby quieted as against the defendant George W. Whitaker and —— Whitaker, his wife, and all persons claiming under them or either of them; and they are forever enjoined from setting up any claim to said premises or any part thereof adverse to the title and possession of the said plaintiff Thomas Mc-
168 Bride, his heirs and assigns thereto; and a writ of possession is hereby ordered to put said plaintiff in possession of said premises.

And it is further ordered, adjudged and decreed that the title and possession of the defendant William H. Kilgore, to all and singular the north half of the island in Mosquito channel of the Platte river, in section twelve, township eight north, range fifteen, Buffalo county, Nebraska, described in the plaintiff's petition, be and the same hereby are quieted as against the defendant George W. Whitaker and —— Whitaker his wife, and all persons claiming under them or either of them are hereby enjoined from setting up any claim to said premises or any part thereof adverse to the title and possession

of the said William H. Kilgore, his heirs and assigns thereto; and a writ of possession is hereby ordered to put said Kilgore in possession of said premises.

It is further ordered and adjudged that the plaintiff recover of the defendant George W. Whitaker his costs herein taxed at $— and that the defendant William H. Kilgore recover of the defendant George W. Whitaker his costs herein taxed at $—.

The application of the defendant George W. Whitaker to have the amount of the appeal and supersedeas bond fixed is denied, to which he excepts.

(Signed) CHARLES L. GUTTERSON, *Judge.*

(Endorsed:) Supreme court of Nebraska. Filed Aug. 25, 1903. Lee Herdman, clerk.

169 In the District Court of Buffalo County, Nebraska.

THOMAS MCBRIDE, Plaintiff,
v.
GEORGE S. WHITAKER, —— WHITAKER, His Wife; WILLIAM H. Kilgore and —— Kilgore, His Wife, Defendants.

STATE OF NEBRASKA, } ss:
Buffalo County, }

I, George A. Nixon, clerk of the district court, within and for the within county and State do hereby certify the above and foregoing to be a true, full and correct transcript of the record in the above entitled cause as the same appears on file and of record in my office, to-wit: the petition, the answer of the defendants Kilgore, the order of the 19th of September directing the defendants to plead, the motion of the defendant Whitaker to compel the plaintiff to make the petition more definite and certain, the order of September 20, 1898, overruling the defendants' motion to strike and the order overruling the defendants' demurrer to the petition, the demurrer of the defendants Whitaker, the answer of defendants Whitaker to the cross-petition and answer of Wm. Kilgore, the answer of the defendants Whitaker to the petition of plaintiff, the order of February 15th, 1899, permitting the defendant to amend by interlineation, the reply of Thomas McBride to the answer of the defendants Whitaker, the reply of William H. Kilgore and Sophia A. Kilgore to the answer of George W. Whitaker and Mary I. Whitaker, the amended petition filed June 12,
170 1899, the amended answer of the defendant Kilgore filed June 18, 1899, the first judgment of the district court rendered June 13, 1899, the appeal bond of W. H. Kilgore filed on the 29th day of June, 1899, the supersedeas bond of Thomas McBride filed June 29, 1899, the bill of exceptions, including the testimony

of the first trial, filed Nov. 28, 1899, the order of the supreme court recalling the mandate filed April 8, 1903; the mandate of the supreme court, including the opinion of the supreme court, and the orders of the supreme court of the date of June 20, 1903, filed June 22, 1903, the motion of the defendant George S. Whitaker representing that he had served counsel for Thomas McBride and William H. Kilgore with a notice of an application for a rehearing in the supreme court, and which motion was filed together with the papers thereto attached, June 22, 1903, the judgment of the court of the date of June 22, 1903, the bill of exceptions upon the motion of the defendant George S. Whitaker objecting to the rendition of any judgment under the mandate until the motion pending in the Supreme Court shall have been heard and disposed of and which bill of exceptions was filed on the 8th day of August, 1903, the motion to correct the journal entry, the order of the court of the date of June 21, 1903, overruling the motion of the defendant George S. Whitaker to correct the journal entry of the judgment rendered under the mandate so that said judgment shall correspond with and conform to the opinion delivered by Commissioner Duffie, the
171 notice of the motion to recall the writ of assistance served on McBride's counsel filed July 24, 1903, the notice to recall the writ of assistance served on the counsel of William H. Kilgore, July 24, 1903, and filed July 24, 1903, the supersedeas bond filed by George S. Whitaker as principal, the motion to recall the writ of assistance, the order of the court of August 4, 1903, refusing to recall the writ of assistance.

In witness whereof, I have hereunto set my hand and affixed the seal of this court this 24th day of August, A. D., 1903.

[SEAL.] GEO. A. NIXON,
Clerk Dist. Court.

Endorsed: 13383. McBride *v.* Whitaker. Transcript on motion to recall writ of assistance. Transcript. Supreme court of Nebraska. Filed Aug 25, 1903. Lee Herdman, clerk.

172 STATE OF NEBRASKA, *ss:*

I, Lee Herdman, clerk of the supreme court of said State, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings in the case of Thomas McBride, appellant, *v.* George W. Whitaker, and —— Whitaker, his wife, appellees, impleaded with William H. Kilgore and —— Kilgore, his wife, appellants, No. 11090, as fully as the same remains on file or of record in my office.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said supreme court at the city of Lincoln, State of Nebraska, this 19th day of October, 1903.

[Seal of Supreme Court of Nebraska.]

LEE HERDMAN,
Clerk of the Supreme Court of Nebraska.

173 And afterward, to-wit, on the 23rd day of September A. D., 1903, there was filed in the office of the clerk of said supreme court a certain petition for writ of error, order allowing writ of error, statement of the chief justice of the supreme court of Nebraska, assignments of error writ of error and bond, the originals whereof are attached hereto, and follow:

174 In the Supreme Court of the State of Nebraska.

THOMAS MCBRIDE, Appellant,
vs.
GEORGE S. WHITAKER and —— WHITAKER, His Wife, Appellees, Impleaded with William H. Kilgore, also Appellant. } General No. 11090.

GEORGE S. WHITAKER and MARY I. WHITAKER, His Wife, Appellees in the Above Entitled Cause, Plaintiffs in Error,
vs.
THOMAS MCBRIDE and WILLIAM H. KILGORE, Appellants in the Above Entitled Cause, Defendants in Error. } Petition for Writ of Error.

To the Honorable John J. Sullivan, chief justice of said court:

Your petitioners, George S. Whitaker and Mary I. Whitaker, his wife, respectfully represent that on the fourth day of June, 1902, in the above entitled suit and in the said supreme court of the State of Nebraska, a judgment was rendered against your petitioners which judgment is final and the court rendering the same is the highest court in said State in which a decision of said cause could be had. That by said judgment a former judgment of the district court of Buffalo county, Nebraska, being a court of original jurisdiction, in favor of your petitioners, was reversed and set aside. That thereafter on the 22nd day of June, 1903, the said district court of Buffalo county, Nebraska, under and by direction of the said judgment of the said supreme court and in obedience to the mandate thereof, rendered its judgment in accordance with the said judgment, opinion and mandate of the said supreme court and against your petitioners and in favor of the said defendants in error. That the said judgment of the said district court has become the judgment of the said supreme court of the State of Nebraska and has been duly certified thereto and approved thereby and is the final judgment of the highest court in said State in which a decision of said cause could be had.

175 Your petitioners further show that in the rendition of said judgment by said court:—

There was drawn in question the validity of an authority exercised under the United States and the decision of said court was

against its validity; it was claimed by the plaintiffs in error that the exclusive control of the public lands of the United States until after the survey and sale thereof, including the land in controversy, was within the jurisdiction of the Land Department of the United States and controlled and directed by the Commissioner of the General Land Office of the United States and the Secretary of the Interior, and this contention of the plaintiffs in error was denied, and the court held that while the land in controversy, an unsurveyed island, might belong to the United States and that the United States might lawfully assert title thereto either on its own behalf or a future grantee, yet that the land could be taken from the possession of a qualified homestead-entryman seeking to have the same surveyed and to enter the same as a homestead, and possession thereof be given by the court to one claiming ownership by reason of the purchase from the Government by a grantor of certain fractional lots separated from the island in controversy by two certain inside channels of the Platte river and that title to the said unsurveyed island could properly be quieted in the owners of the fractional lots (who claimed the island by no grant in express terms) as against the proposed homestead-entryman whose residence thereon extended over a period of more than six years and who claimed vested rights by reason of his settlement and permanent improvements, and the action of the Government in permitting his occupancy.

It was claimed by plaintiffs in error, who are husband and wife, that they were entitled to the possession of the island in controversy under the validity of an authority exercised by the United States and until such time, in any event, as the United States by a grant in express terms to a third party, should divest itself of the title thereto, or until such time as the United States should attempt to eject them therefrom, and this contention was denied.

There was also drawn in question the construction of that
176 certain statute of the United States approved July 21st, 1876, and entitled "An act to provide for the sale of the Fort Kearney military reservation in the State of Nebraska," being chapter 220 of volume 19 of the United States Statutes at Large, and also the construction of the statutes of the United States pertaining to the survey and sale of the public lands of the United States and the disposal thereof under the homestead laws of the United States. It was claimed by your petitioners in error that the said island in controversy could not have been sold to the defendants in error or either of them for that it was not surveyed and was not described or in any way referred to in the patents conveying the fractional lots. That it could not be sold until it was surveyed, although a lawful settlement might be made upon it under the said statute providing for the sale of the Fort Kearney military reservation and the homestead laws of the United States, and your petitioners were the first settlers upon the said island and obtained the first right thereto under the said statutes of the United States; and the decision of said

court was against the right, title and privileges set up by your petitioners in the said suit, and claimed under the said statutes, and each and all of their contentions were denied.

Wherefore your petitioners pray the allowance of a writ of error removing the record and proceedings in the said suit to the Supreme Court of the United States and that a citation be directed to the said Thomas McBride and the said William H. Kilgore for their due appearance in said Supreme Court.

HAMER & HAMER,
Attorneys for Petitioners.

[Endorsed:] 11090 McBride *v.* Whittaker. Petition for writ of error. Supreme court of Nebraska. Filed Sep. 23 1903 Lee Herdman clerk.

177 A writ of error is allowed as prayed for in the above petition this 21st day of September, 1903. Said writ of error shall operate as a supersedeas and shall stay all further proceedings in said cause upon the execution by the said plaintiffs in error of a bond in the penal sum of $500.00, conditioned that the said plaintiffs in error shall prosecute their said writ to effect and answer all damages and costs if they fail to make their said plea good, and pay to the defendants in error the value of the use and occupation of the property in controversy until the delivery of the possession to the said defendants in error if the judgment appealed from shall be affirmed.

J. J. SULLIVAN,
Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 11090 McBride *v.* Whittaker Order allowing writ of error. Supreme court of Nebraska. Filed Sep. 23 1903 Lee Herdman clerk.

178 In the Supreme Court of the State of Nebraska.

THOMAS MCBRIDE, Appellant,
vs.
GEORGE S. WHITAKER, —— WHITAKER, His Wife, Appellees, Impleaded with William H. Kilgore, also Appellant.

General No. 11090.

GEORGE S. WHITAKER and MARY I. Whitaker, His Wife, Appellees in the Above Entitled Cause, Plaintiffs in Error,
vs.
THOMAS MCBRIDE and WILLIAM H. Kilgore, Appellants in the Above Entitled Cause, Defendants in Error.

Statement of the Chief Justice of the Supreme Court of Nebraska.

Upon the trial and hearing of the said cause in the supreme court of the State of Nebraska on the 4th day of June, 1902, the judgment of the district court of Buffalo county was reversed and the said cause was remanded to the district court of Buffalo county with directions to render a judgment according to the opinion and judgment of the supreme court of Nebraska. And thereafter as appears by the record, the said district court of Buffalo county rendered its judgment in accordance with the opinion and mandate of the supreme court, and the said judgment has since been certified to this court. Upon the trial and the hearing of said cause in the supreme court of the State of Nebraska there was drawn in question the validity of an authority exercised under the United States. It was claimed by the plaintiffs in error that the exclusive control of the public land s of the United States until after the survey and sale thereof, including the island in controversy, was within the jurisdiction of the Land Department of the United States and control-ed and directed by the Commissioner of the General Land Office of the United States and the Secretary of the Interior, and this contention of the plaintiffs in error was denied, and the court held that while the island in controversy might belong to the United States and that the United States might properly assert title thereto in the future,
179 either on its own behalf or on behalf of a future grantee, yet that the land might rightfully be taken from one in possession of it, having the qualifications to make a homestead entry, and who was seeking to have the island surveyed and to make a homestead entry of the same, and that title might be quieted in the owners of fractional lots claiming the island without any grant in express terms and by reason of the fact that their fractional lots abutted upon the inside channels of the Platte river surround-

ing the island. The court also held that the owners of the fractional lots, McBride and Kilgore, were entitled to the island as against the plaintiff in error, George S. Whitaker, although their title might not be clearly established and although the United States might be entitled to the possession of the island and might lawfully assert its title thereto either on its own behalf or on behalf of a future grantee. The court also held that George S. Whitaker, the proposed homestead-entryman obtained no vested rights by reason of his settlement upon the island the making of permanent improvements thereon or by the action of the Government in permitting his occupancy for a period of time extending over six years. The court also held that although the island was unsurveyed the title thereto might be quieted in the grantees of the persons who purchased the fractional lots abutting on the inside channels of the Platte river surrounding the island.

It was also claimed by plaintiffs in error, who are husband and wife, that they were entitled to the possession of the island in controversy under the validity of an authority exercised by the United States and until such time, in any event, as the United States by a grant in express terms to a third party, should divest itself of the title thereto, or until such time as the United States should attempt to eject them therefrom, and this contention was denied.

There was also drawn in question the construction of the statute of the United States approved July 21st, 1876, and entitled "An act to provide for the sale of the Fort Kearney military reservation in the State of Nebraska," being chapter 220 of volume 19 of the United States Statutes at Large, and the construction of the statutes of the United States pertaining to the survey and sale of the public lands of the United States, and the disposal thereof under the homestead laws of the United States, were also drawn in question.

180 It was claimed by the plaintiffs in error that the island in controversy was not sold to the purchasers of the lots for the reason that it was not mentioned in their patent and for the further reason that it was not surveyed and could not have been sold under the law until after it was surveyed. And this contention of the plaintiffs in error was denied. It was also claimed upon the said trial and hearing that the said island could not be sold until it was surveyed, although a lawful settlement might be made upon it under the law. This contention of plaintiffs in error was denied. It was also claimed by plaintiffs in error that they were the first settlers upon the said island and therefore that the said George S. Whitaker had obtained the first right thereto under the said statutes of the United States and there was testimony uncontroverted which tended to establish that the plaintiffs in error were the first settlers upon the said island and the court so found, yet the decision of the said court was against all right, title, privilege and interest set up by the plaintiffs in error in said suit and claimed under the said statutes of the United States, and each and all of the contentions of the plaintiffs in error were denied and overruled and by reason thereof the said

judgment was rendered in favor of the said Thomas McBride and William H. Kilgore and against the plaintiffs in error, George S. Whitaker and Mary I. Whitaker.

J. J. SULLIVAN,
Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 11090 McBride *v.* Whittaker Statement by chief justice. Supreme court of Nebraska. Filed Sep. 23 1903 Lee Herdman clerk.

181 In the Supreme Court of the State of Nebraska.

THOMAS MCBRIDE, Appellant, *vs.* GEORGE S. WHITAKER, —— WHITAKER, His Wife, Appellees, Impleaded with William H. Kilgore, also Appellant.	General No. 11090.
GEORGE S. WHITAKER and MARY I. WHITAKER, His Wife, Appellees in the Above-entitled Cause, Plaintiffs in Error, *vs.* THOMAS MCBRIDE and WILLIAM H. KILGORE, Appellants in the Above-entitled Cause, Defendants in Error.	Assignment of Errors.

Come now George S. Whitaker and Mary I. Whitaker, his wife, plaintiffs in error in the above entitled cause in the above named court and assign the following as manifest error upon the face of the record to be corrected in the Supreme Court of the United States, to which this cause is to be removed on a writ of error duly allowed for that purpose, to wit:

I.

It was claimed by the plaintiffs in error upon the trial of the cause that the island in controversy being unsurveyed belonged to the public domain except that the plaintiff in error, George S. Whitaker, being the head of a family and a qualified homestead-entryman had obtained a vested right to the island by virtue of his settlement upon it and his request to the Land Commissioner of the General Land Office, to have the island surveyed and to be allowed to make a homestead entry of it, and that the United States Land Department had exclusive jurisdiction and control of the island and that the State court could have no jurisdiction without ousting the Land Department from its jurisdiction. The claim of plaintiffs in error was denied and the court assumed jurisdiction. The court erred in refusing to hold that the Land Department of the United States had

exclusive jurisdiction of the subject matter of the controversy
182 and should have held that the plaintiffs in error were entitled to a judgment dismissing the plaintiff's bill for want of jurisdiction of the subject matter of the controversy.

II.

It was claimed by the plaintiffs in error that the exclusive control of the public lands of the United States until after the survey and sale thereof, including the land in controversy, was within the jurisdiction of the Land Department of the United States and controlled and directed by the Commissioner of the General Land Office of the United States and the Secretary of the Interior, and this contention of the plaintiffs in error was denied and the court held that while the land in controversy, an unsurveyed island, might belong to the United States and that the United States might lawfully assert title thereto, either on its own behalf or on behalf of a future grantee, yet that the land could be taken from the possession of a qualified homestead-entryman seeking to have the same surveyed, and to enter the same as a homestead, and that possession thereof might be given to one who had no other claim of ownership than owning a fractional lot coming down to one of the inside channels of the Platte river surrounding the island, and the court further held that the title to the island might be quieted as against a homestead-entryman lawfully in possession of the island and who had occupied the same for a period of more than six years and who claimed vested rights by reason of his settlement and permanent improvements, and because of the action of the Government in permitting his occupancy. That the court erred in so holding and in failing and refusing to consider that the said plaintiff in error, George S. Whitaker, had obtained a vested right of possession to the said island.

III.

The island in controversy was found by the trial court to contain more than twenty-two acres and that the plaintiff in error, George S. Whitaker, occupied the island as one seeking to make a homestead entry of it, and that the island was unsurveyed, and that the Government surveyors had neglected their duty in that behalf, and that their failure to survey the island did not bind the Government and could not be used to its disadvantage. And the supreme court of the State of Nebraska should have affirmed the judgment of the district court of Buffalo county of the date of June 13th, 1899,
183 and the failure to so find is error for which its judgment should be reversed.

IV.

That the court erred in holding that unsurveyed lands of the United States could be taken from one man and given to another.

V.

That the court erred in holding that it was not necessary for McBride and Kilgore to establish a clear title to the land and that although they had failed to prove title Whitaker could receive no benefit by reason of their failure.

VI.

That the court erred in holding that the rule that the plaint- is required to recover the possession of real property upon the strength of his own title, has no application where the title belongs to the United States and the land is occupied by a prospective homesteader.

VII.

That the court erred in exceeding the bounds accorded to riparian owners. Instead of going to the centre of the channel the court crossed the channel and appropriated the land beyond it with a view to ousting the jurisdiction of the Commissioner of the General Land Office and the Secretary of the Interior.

VIII.

Plaintiffs in error claimed that they were entitled to the possession of the island under the validity of the authority exercised by the United States and that in any event they were entitled to hold possession of the island until the United States divested itself of its title, or until the United States attempted to eject them from the premises. The court erred by denying this contention.

IX.

Plaintiffs in error claimed that under the act of Congress of July 21st, 1876, entitled "An act to provide for the sale of the Fort Kearney military reservation in the State of Nebraska," and under the United States homestead statutes, George S. Whitaker had obtained a vested right to the possession of the island by virtue of his settlement and because he was the first settler and that plaintiffs in error were entitled to a judgment dismissing the bill of the said Thomas McBride. That the court erred in denying the contention of the plaintiffs in error and in refusing to render a judgment in their favor.

184

X.

The act of Congress of July 21st, 1876 was passed to encourage settlement on the land included within the Fort Kearney military reservation, to protect all settlers who might go upon the reservation before the land was sold and to protect the rights of those who had already settled on the reservation at the time the act was passed.

The purpose was to enable a valid settlement to be made upon unsurveyed land within the reservation, and after survey to convey the land to the man who had settled. Therefore George S. Whitaker, by his settlement became possessed of a vested right. The owner of a fractional lot coming down to the shore of an inside channel got no title to the island beyond the channel because it was not surveyed. As in any event he could only hold to the centre of the channel he could not cross it and get any part of the island. Therefore the court erred in quieting title in McBride and Kilgore.

XI.

One islander obtains no right as a riparian owner against another islander. McBride and Kilgore are islanders. They can have no right against the United States or against an occupant on United States lands. Therefore the court erred in rendering a judgment in favor of McBride and Kilgore.

HAMER & HAMER,
Attorneys for Plaintiffs in Error.

[Endorsed:] 11090 McBride v. Whittaker Assignments of error. Supreme court of Nebraska. Filed Sep. 23 1903 Lee Herdman clerk.

185 Know all men by these presents: That we, George S. Whitaker and Mary I. Whitaker, as principals, and Oscar E. Lowell as surety, are held and firmly bound to Thomas McBride and William H. Kilgore, of Buffalo county, Nebraska, in the full and just sum of five hundred dollars, to be paid to the said Thomas McBride and William H. Kilgore, their executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

Dated this — day of September, 1903.

Whereas lately at a term of the supreme court of the State of Nebraska, in a suit pending therein between the above named Thomas McBride, as appellant, *vs.* George S. Whitaker, and —— Whitaker his wife, appellees, impleaded with William H. Kilgore, also appellant, a judgment was rendered against the said George S. Whitaker and Mary I. Whitaker, his wife, in favor of Thomas McBride and William H. Kilgore, under which said judgment and the opinion of the said court, a mandate was sent to the district court of Buffalo county, Nebraska, commanding the said district court of Buffalo county, Nebraska, to render a judgment in favor of the said Thomas McBride and the said William H. Kilgore and against the said George S. Whitaker and Mary I. Whitaker, his wife, and

Whereas the said district court of Buffalo county, on or about the 22nd day of June, 1903, rendered its said judgment in said cause, in favor of the said Thomas McBride and the said William H. Kilgore,

and against the said George S. Whitaker and Mary I. Whitaker, his wife, and which said judgment has been certified to the supreme court of the State of Nebraska, and the said George S. Whitaker and Mary I. Whitaker, his wife, having prayed and obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit and a citation directed to the said Thomas McBride and William H. Kilgore, citing and admonishing them, and each of them to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof:

Now the condition of the above obligation is such that if the said George S. Whitaker and Mary I. Whitaker shall prosecute said writ to effect and answer all damages and costs if they fail to make their plea good, and pay to the defendants in error, Thomas McBride and William H. Kilgore, the value of the use and occupation of the property in controversy until the delivery of the possession to the said defendants in error, if the judgment appealed from shall be affirmed, then the above obligation to be void, else to remain in full force and virtue.

GEORGE S. WHITAKER.
MARY I. WHITAKER.
OSCAR E. LOWELL.

Sealed and delivered in the presence of
JAMES A. GRAHAM.

Approved by me this 22d Sept. 1903.

J. J. SULLIVAN.
Chief Justice of the State of Nebraska.

[Endorsed:] 11090. McBride *v.* Whittaker. Bond. Supreme court of Nebraska. Filed Sep. 23 1903 Lee Herdman, clerk.

186 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the supreme judges of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nebraska before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Thomas McBride, appellant *vs.* George S. Whitaker, —— Whitaker, his wife, appellees, impleaded with William H. Kilgore, also appellant, and in which said cause George S. Whitaker and Mary I. Whitaker, his wife, appellees, now appear as plaintiffs in error *vs.* Thomas McBride and William H. Kilgore, appellants in the first above entitled cause, defendants in error, wherein was drawn in question the validity of an authority ex-

ercised under the United States and the decision was against its validity, and wherein was drawn in question the construction of certain statutes of the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said statutes; a manifest error hath happened to the great damage of the said George S. Whitaker and Mary I. Whitaker as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the 23 day of September, in the year of our Lord 1903.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. T. HUMMEL.
Clerk of the Circuit Court of the United States.

Allowed by

J. J. SULLIVAN,
Chief Justice of the State of Nebraska.

J. J. SULLIVAN,
Chief Justice of the Supreme Court of the State of Nebraska.

[Endorsed:] 11090. McBride *v.* Whittaker. Writ of error. Supreme court of Nebraska. Filed Sep. 23 1903. Lee Herdman clerk.

187 And afterward, to-wit: on the 17th day of October, A. D., 1903, there was filed in the office of the clerk of said supreme court a certain citation with service endorsed thereon, which service was made on the 24th day of September, 1903, and there was also filed a certain citation with service thereon, which service was made on the 28th day of September, 1903. The originals whereof are attached hereto and follow:

188 UNITED STATES OF AMERICA, *ss:*

To Thomas McBride and William H. Kilgore, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within 30 days from the date hereof pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein George S. Whitaker and Mary I. Whitaker of Buffalo county, Nebraska, are plaintiffs in error, and you, the said Thomas McBride and William H. Kilgore, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. J. Sullivan, chief justice of the supreme court of the State of Nebraska, this 22d day of September, 1903.

J. J. SULLIVAN,
Chief Justice of the Supreme Court of Nebraska.

Received a copy of the within this 24th day of September, 1903.

E. C. CALKINS,
Att'y for W. H. Killgore.

I hereby accept service of above Sept. 24, 1903.

GEORGE A. NIXON,
Clerk Dist. Court.

Service of the above citation accepted this 24th day of September 1903.

H. M. SINCLAIR,
Att'y for Thomas McBride.

STATE OF NEBRASKA, }
Buffalo County, } *ss:*

Logan Sammons being first duly sworn deposes and says that he is the sheriff of Buffalo county, Nebraska that he is not the attorney of any party in the above entitled case or otherwise interested therein that on the 24th day of September 1903 he served the foregoing citation upon the above named William H. Kilgore by personally delivering to him within said county a true copy of the said citation.

LOGAN SAMMONS.

Subscribed in my presence and sworn to before me this 24th day of September 1903.

[Notarial Seal of Chas. Reilly, Buffalo County, Neb.]

CHAS. REILLY,
Notary Public.

My commission expires Jan. 9, 1906.

[Endorsed:] 11090. McBride *v.* Whittaker. Citation with service. Supreme court of Nebraska. Filed Oct. 17 1903. Lee Herdman clerk.

189 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Thomas McBride and William H. Killgore, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein George S. Whitaker and Mary I. Whitaker of Buffalo county, Nebraska are plaintiffs in error, and you, the said Thomas McBride and William H. Killgore are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. J. Sullivan, chief justice of the supreme court of the State of Nebraska, the 22d day of September, 1903.

J. J. SULLIVAN,
Chief Justice of the Supreme Court of Nebraska.

Service of the above citation accepted this 28th day of September, 1903.

H. M. SINCLAIR,
Att'y for Thos. McBride.
E. C. CALKINS,
Att'y for Killgore.
GEORGE A. NIXON,
Clerk Dist. Court, Buffalo Co., Nebraska.

[Endorsed:] 11090. McBride *v.* Whittaker. Citation. Supreme court of Nebraska. Filed Oct. 17 1903 Lee Herdman, clerk.

190 STATE OF NEBRASKA, *ss:*

In obedience to the command of the within writ, I, Lee Herdman, clerk of the supreme court of said State of Nebraska, do herewith transmit to the Supreme Court of the United States of America a duly certified transcript of the record and proceedings in the within entitled cause together with all things concerning the same, to-wit: the original petition for writ of error, order allowing writ of error, statement of the chief justice of the supreme court of Nebraska, assignments of error, bond and writ of error, as well as two citations with service endorsed.

And I further certify that I have retained in my said office true and certified copies of the said petition for writ of error, order allowing writ of error, statement of the chief justice of the supreme court of Nebraska, assignments of error, bond, writ of error and said two citations.

Seal Supreme Court of Nebraska.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said court at Lincoln, State of Nebraska, this 19th day of October, A. D., 1903.

LEE HERDMAN,
Clerk of the Supreme Court of the State of Nebraska.

Endorsed on cover: File No. 19,101. Nebraska supreme court. Term No. 135. George S. Whitaker and Mary I. Whitaker, plaintiffs in error, *vs.* Thomas McBride and William H. Killgore. Filed October 30th, 1903. File No. 19,101.

FILE COPY.

FILED
JAN 20 1905

In the Supreme Court of the United States

George S. Whitaker,
Plaintiff in Error
vs.
Thomas McBride and William Kilgore,
Defendants in Error

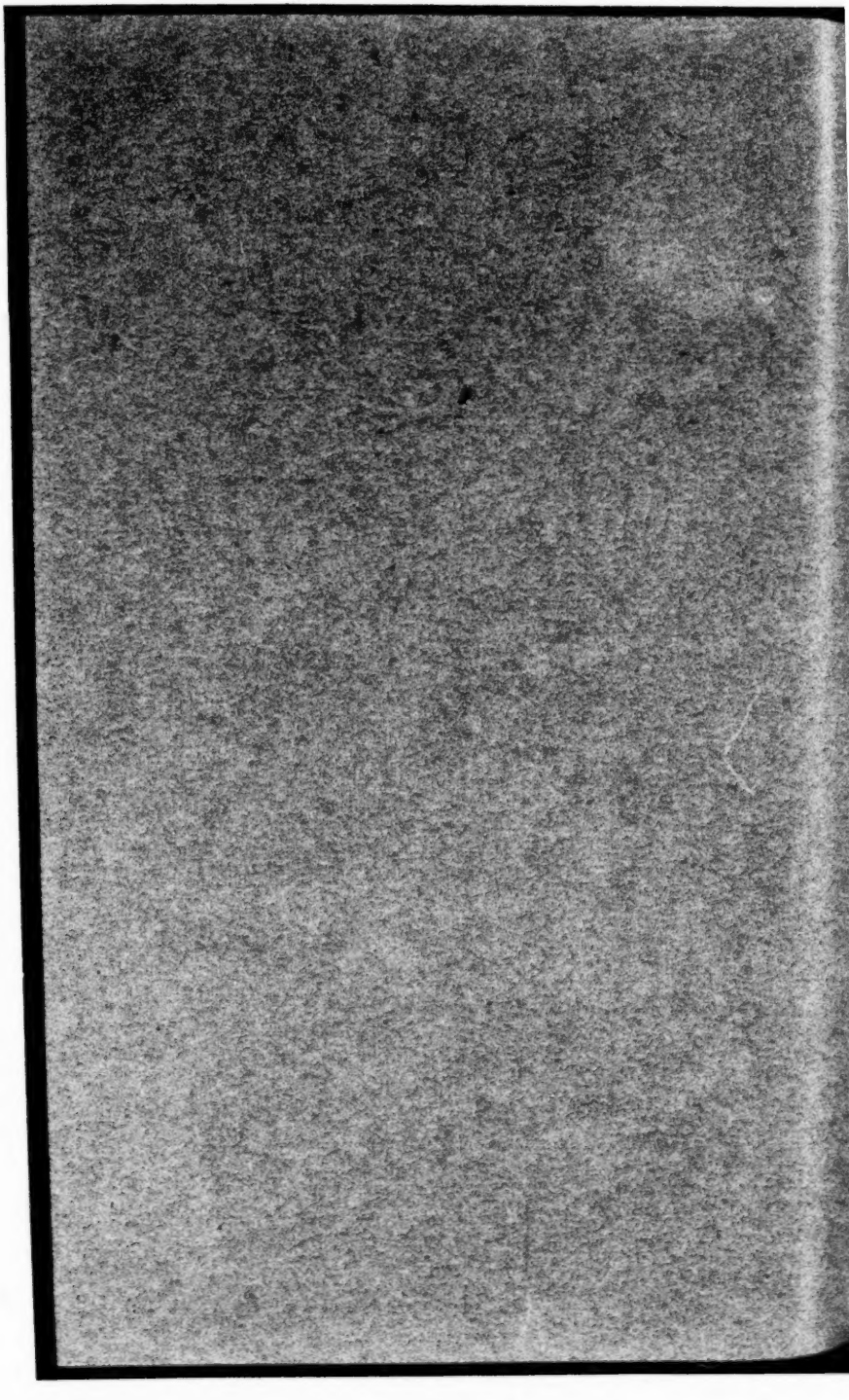
No. 135.

Error to the Supreme Court of the State of Nebraska

Brief and Argument of Plaintiff in Error

E. E. BROWN and
FRANCIS G. HAMER,
Attorneys for Plaintiff in Error

H. M. SINCLAIR,
Attorney for Defendants in Error.



In the Supreme Court of the United States

George S. Whitaker,
Plaintiff in Error

vs.

Thomas McBride and William Kilgore,
Defendants in Error

Error to the Supreme Court of the State of Nebraska

Brief and Argument of Plaintiff in Error

E. E. BROWN and
FRANCIS G. HAMER,
Attorneys for Plaintiff in Error
H. M. SINCLAIR,
Attorney for Defendants in Error.

This is a proceeding in error to reverse a judgment of the Supreme Court of the State of Nebraska, awarding possession of the matter in controversy to the defendants in error. The matter in controversy is an island in the Platte river belonging to the United States, but which plaintiff in error seeks to occupy and own as a homestead. At the point where the island in question is found, the Platte river is about *two miles* in width, measuring the *land* as well as the *water*, and it consists of *numerous small channels* and *numerous islands*, some of which are quite extensive in size. These islands are sometimes rather wide, but they are often narrow and they are gen-

erally of considerable length. They are very productive and consequently valuable. The *particular island* in question was used by Whitaker as a market garden where he raised onions, beets, sugar corn, cabbages and all kinds of garden produce, the susplus over and above what he needed for his family, he sold in the market. He had also planted a small orchard. He lived upon the island with his family. He continued to so use the land until he was *put off the premises* under the decision of the Nebraska Supreme Court. He sought to enter the island as a homestead. The Platte river is very shallow. Its average depth in summer, except during the June rise, is *not more than six inches.* The island in controversy, in common with the other islands in the vicinity, has probably been *in existence hundreds of years.* Because of the shallow water in the river, the river does not change its course rapidly, or change the formation of the islands. All is seemingly stationary. The water in the numerous channels would probably measure a mile in width. The united width of the islands would be about the same, except in some places much wider.

This island is part of the Fort Kearney Military Reservation. The Act providing for the survey and sale of that Reservation is a local act passed in 1876 and contained in the nineteenth U. S. Statutes at large, at page 94. At the time this act was passed many settlers had *already gone* upon the reservation and many more *were going upon it* and *were expected to go upon it.* Congress passed this local act to *protect such settlers* who were making and expected to make such settlements. Whitaker is a qualified homestead entryman, and belongs to the class expected to settle. Our contention is that Congress intended to *encourage settlement* upon this *particular Reservation*, and that Whitaker is therefore entitled to the protection which the Act gives him. Whitaker settled upon *unsurveyed government* land. All parties concede that

this *island is unsurveyed.* It is claimed by our adversaries that Whitaker could not make a lawful settlement and could not obtain any right to the possession of the island because McBride and Kilgore had each purchased a part of two *other* islands which were separate and distinct from this island, and one of which was on the north side of this island, and the other of which was on the south side of this island. Their contention is that if one purchases an island from the government, or a part of an island, that he has also purchased the island *next to him,* although the government has *not* sold it to him nor in *any way described it in his grant.* Our contention is that the government only sells the island which it describes in the grant, the particular island, and that it does *not sell another* island which is *unsurveyed* and *not described* in the grant. The island which Whitaker settled upon is only *one* of *many unsurveyed* islands in the Platte river within the Fort Kearney Military Reservation. By actual measurement it contains 47 acres and some hundredths. In the immediate vicinity of this island are *many other islands* which are *also unsurveyed.* Some islands have been surveyed and sold to actual settlers *since* the original survey, but there is a great effort upon the part of those who made the first purchases of land on surveyed islands to *claim also the unsurveyed islands.* They seem to hope to control congressmen and thus to prevent *any more* surveys being made, and so to keep *additional* settlers out. The men who made the first purchases on these islands in the Platte river were cattle men, and they seem to consider that they own *all* the land, that which belongs to the government and is unsurveyed, as well as that which they have purchased from the government and which has been surveyed and granted to them.

Most of these unsurveyed islands contain sixty to one hundred acres; some of them more. Because of their exceeding productiveness they are worth from forty to fifty

dollars per acre. There may be *fifty* of these unsurveyed islands within the Fort Kearney Military Reservation, but whatever the number may be our contention is that they *belong to the government of the United States*, and that they are *subject to settlement* by qualified homestead entrymen, and that *only the United States* may put settlers off when they have once settled upon these lands, and that the government of the United States seeks to PROTECT these settlers and to furnish them with HOMES instead of driving them out.

When the original survey was made there was an omission to survey the island heretofore mentioned. It was, probably, very unpleasant to cross these channels when they were filled with ice water in the early spring months at the time the survey was made. The instructions from the Land Department to the surveyors who surveyed the Fort Kearney Military Reservation were to survey *all* islands of *twenty-one acres and upwards.* Notwithstanding these instructions *many* of the islands were *not surveyed.* Some of these islands contain as much as one hundred and twenty acres of land. It was contended by counsel for McBride and Kilgore who cooperated together that if any of these islands were unsurveyed then that the fact that they were unsurveyed distinctly disclosed the purpose of the government to *abandon* the islands. Our contention is that the fact that the government surveyors did not survey the island does *not* show that the government *abandoned it* or that it had *any intention to abandon it.* That the island was not surveyed simply proves that it was not surveyed. *Why* it was not surveyed is not shown by the *fact* that it was not surveyed. The Nebraska Supreme Court Commissioner who wrote the opinion of the Supreme Court draws the conclusion, first, that the land was *abandoned* by the government because it was *not* surveyed; and then draws a second con-

clusion that it was not surveyed and was abandoned because it did *not contain twenty-one acres of land.* The mere failure to survey warrants neither conclusion. That the land was not surveyed may be accounted for upon *any number* of reasonable hypotheses *other* than the fact that the government *had abandoned it.* The Nebraska Supreme Court Commissioner bases his opinion on *circumstantial evidence.* Jones on the Law of Evidence, Sec. 901, states the rule concerning circumstantial evidence as applied to criminal cases thus:

> The circumstances proved must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the accused." U. S. v. Martin, 2 McLean (U. S.) 256; Williams v. State, 41 Texas 209; People v. Dick, 32 Cal. 213; United States vs. Douglas, 2 Blatch. (U. S.) 207.

First, of course, the surveyors may have intended to return and finish the survey, but (a) they forgot it; (b) or were retired from office before they returned; or, (c) something else happened which prevented their return: Second, Or at the time they made the survey they may have found the channels covered with ice water, and so disagreeable a job they deferred finishing up until *a future time,* and then they may have been sent somewhere else: or, they may have run out of provisions; or they may have got sick. That the *survey was not finished,* simply proves that the *survey was not finished.* As we understand it the meander line on the north of the island is part of the time north of the stream or streams that surround the island on the north side, and part of the time south of them. We think it is proper to remember that a meander line ought *never* to cross the stream which it meanders. It should also be remembered that in *any event* the islands extend to the *actual line* of the *stream* sought to be meandered, and there is no variation from this rule. Therefore the south side of lot 7 extends down to the stream on the north side of the island, but it can-

not extend beyond it. This lot 7 is bounded by the stream on the south side and not by the meander line, because the *meander line* never *fixes the boundary.* It only serves as a *means of measurement.* Lot 6 which is on the north side comes down to the channel intended to be meandered. It cannot extend *south* of that *channel.* But it is not bounded by the meander line because that is *never intended* to be a *boundary.* Lot 8 which is on the south side of the island extends *north* to the *channel* which runs on the south side of the island, but it cannot extend *beyond* that channel. It cannot extend beyond that channel for the reason that the *actual channel* is *always* the *boundary* and *not* the *meander line* which is simply made for the purposes of measurement. Sphung v. Moore, 120 Ind. 356. It is true the meander line made with reference to the *south channel* crosses the channel and crosses a part of the island land, but lot 8 cannot cross the channel and extend up to this meander line. The meander line as shown by the testimony, was put there by guess. But whether it was or not *no one may dispute* the *actual boundaries* of the island. The *boundaries determine the limits.* The rights of the parties are shown by the *actual boundaries, by the actual stream itself.* The opinion of the learned Nebraska Supreme Court commissioner shows that his idea is that Whitaker desires to dispute the meander line. *There is no such purpose.* The rights of the parties are fixed by the *actual channels with the water in them.* It is the *actual boundaries* which determine the extent of each island including the island in controversy. The meander lines in this case, whatever they may be, do not extend beyond the island purchased by Kilgore or beyond the island purchased by McBride. The island in question is *unsurveyed* and *has no meander lines.* If there is no survey beyond the lots in question owned by McBride and by Kilgore respectively then McBride and Kilgore *cannot get our is-*

land because the survey fails to make it any part of their lots.

This case was originally tried in the District court of Buffalo county, Nebraska, on the 15th day of February, 1899. That court taking the case under advisement rendered its judgment on the 13th day of June, 1899, as follows:

Findings of the Court.

"June 13th, 1899:

The court finds that the plaintiff McBride at the beginning of this suit was the owner of lot 8 in section 12, township 8, range 15, in Buffalo county, Nebraska. That he made the original entry therefor and obtained title to the same by United States patent, and has been in the open and notorious possession of the same for 15 or 20 years.

The court further finds that the defendant W. H. Kilgore at the beginning of this suit and for a long time prior thereto was the owner of lots 6 and 7 in said section; that he became the owner of the same by virtue of a deed to him from the original patentee of said tract, and that he had been in possession of the same for more than ten years prior to the bringing of this suit.

That said tract of land, with other land, was within the extreme channels of the Platte River; and that lying between lots 6 and 7 on the north, and lot 8 on the south, was a tract of land in said section 12 of about 22 acres entirely surrounded by certain channels in the Platte River, and which is the tract of land in dispute herein.

That the government surveyor when originally surveying said lots 6 and 7 did not actually survey the meander line forming the south line of lots 6 and seven as they were required to do; but that instead of making an actual survey of said meander line along the said channel bordering on said lots 6 and 7, they falsely show upon the map made by them that they had done so, and located upon said plat what they supposed to be the true meander line of said lots 6 and 7. That they never made an actual survey of

the north meander line of said lot 8, but indicated upon the plat made by them what they supposed was the meander line of said lot 8. That they never actually surveyed the meander lines of said tract of land lying between lots 6 and 7 on the one side and lot 8 on the other, and which tract is spoken of in the evidence as an island, but that they indicated upon the plat the general outlines of said island as they understood it to be.

The court further finds that said channels bordering said tract in dispute, the one being on the south of lots 6 and 7 and the other on the north of lot 8, are substantially the same now as they were at the time the original survey was made, and that said channels are substantially as shown by the plaintiff's plat marked plaintiff's exhibit "A" offered in evidence.

The court further finds that the defendant Kilgore at all times since he became the owner of lots 6 and 7, claimed to be the owner of the tract in dispute as part of his said lots 6 and 7; that such claim had not extended over the period of ten years at the begining of this suit; that he had possession during a part of the time of said claim of all of said tract and all the time a part of said tract.

That McBride, ever since he received his final receipt to lot 8, has claimed to be the owner of a part of said island. That they together have had the title to lots 6 and 7 on the one side and lot 8 on the other, and have had possession of the island for more than ten years prior to the bringing of this suit, but that they were contending between themselves during said period as to what part of the island each should have and did not agree.

The court further finds that the south line of said lots 6 and 7 is the channel shown in Exhibit "A" and that the north line of said lot 8 is the channel bounding it on the north as shown in said Exhibit "A."

As a matter of law the court concludes that said island should have been surveyed by the government surveyor; that it was a neglect of duty on their part to not survey the same. That the title to said island still remains in the United States. That it was never the intention of the goverment at the time it gave the patent to said lots 6 and 7 to convey any part of the island, nor

was it the intention of the government to convey it to the patentee of lot 8

The only interest that defendant Whitaker has in said land is that he claims the right to enter the same as a homestead, and that his right is only what possession would give him, and that he has no right thereto.

The court further, concludes as a matter of law, that the government is not bound by the failure of the surveyor hired to do this work by his neglect to perform his duty, and that his failure to actually survey said island did not thereby give the parties to whom the government granted the land on either side thereof any right to it."

The plaintiff in that case offered in evidence his patent to the land south of the south Mosquito Channel (There are two mosquito Channels and some times more. These channels are called by the one name 'Mosquito Channel.' They are a part of the Platte river.) There was no dispute about the fact that the plaintiff McBride was already in the full enjoyment of all the land that his patent called for. Kilgore, in that proceeding, was made a defendant. He offered in evidence his deeds to the lands north of Mosquito Channel. There was no dispute about the fact that he had all the land which his deeds called for. McBride and Kilgore are not endeavoring to regain something that *they have lost* or something they are entitled to under the evidence, but they are endeavoring to invoke the doctrine of Riparian rights *against the United States*, and to claim that they have the right to take *one* island because they own parts of two *other* islands which they purchased from the government. The island which they attempt to appropriate and divide up among themselves, begins *above their lots* and *extends below them*. The Nebraska Supreme Court reversed the judgment of the District Court of Buffalo county and directed the appropriation of the island occupied by Whitaker and its division between McBride and Kilgore.

When the mandate went out to the District Court of Buffalo county to enforce the judgement of the Supreme court, McBride and Kilgore were met with the proposition that the defendant Whitaker had resided on the land continuously since the former trial and that he had made an application to the land office at Lincoln to permit him to enter the land. There was an effort to get these facts *before the trial court.* The trial judge would listen to no showing of *after acquired rights.*

It is our contention in this case that the state courts were absolutely without jurisdiction to invade the domain of the Land Department of the United States, and *that any judgment or decree rendered by the state court was void for want of jurisdiction of the subject matter of the controversy.* But whether void or not in any event the judgment of that court and all proceedings under it to enforce the same, are erroneous. Under the decision of the Supreme Court of the State of Nebraska Whitaker was *arrested and forcibly taken from the premises, fined and put in jail.*

1. We claim that the judgment of the Nebraska Supreme Court and the proceedings thereunder were without jurisdiction because they attempted to take the possession of property *belonging to the United States from the possession of one man and give it to another, and that this was an invasion of the Land Department of the United States.*

2. We further claim that the state Supreme court *exceeded its jurisdiction,* for that the opinion prepared by its Commissioner conceded that the island in controversy had *never been surveyed* and that it was the property of the United States, but held that until the United States *asserted its title* to the island, that it would *take the possession of the island from Whitaker and give it to McBride and Kilgore.*

3. Whitaker also claimed that under the local Act of

Congress authorizing the settlement and disposal of the Fort Kearney Military Reservation and its survey, that he was rightfully in possession of the island, and that it was the duty of the Land Department of the United States to survey the island and to allow him a homestead receipt and patent.

Under the homestead law at the time the evidence was taken in 1899 and the first judgment rendered, Whitaker was only entitled to possession. He was not entitled to make final proof, but at the time the case was heard under the mandate issued by the state Supreme court in June, 1903, four years after the original trial, Whitaker *was entitled* to make final proof under the laws of Congress, which had been amended in the mean time, and was entitled to his patent by reason of the amendment, by reason of his continuous residence and by reason of his improvements and his successful and unremitting cultivation of the soil. He had finally performed the service required of him. He was an American citizen. He was entitled to the reward of American citizenship. He was entitled to the fee of the island which he had converted from an unproductive waste where the coarse grass and rough and scrubby brush grew in rank confusion together to a farm with smooth fields of meadow and yellow grain, and a garden and an orchard where the vegetables and the flowers and the fruits yielded up their willing tribute to the busy hand of intelligent industry. He had won his home for his wife and little ones. He was the *first settler on this island*, and under the Act of Congress of 1876 which gave him the right to *settle* upon it whether it was surveyed or not surveyed, he had the right to go on this island and to hold it forever and ever. It would seem to be the duty of the National government to protect him in his settlement and to give to him all that he is entitled to by reason of his faithful occupation of the premises. Whitaker has found a home and it is a part of the public

domain, and the people of the whole United States, speaking through their representatives in Congress assembled, have declared that Whitaker is entitled to this land.

Ordinarily there can be no legal settlement until the land belonging to the United States *has been surveyed* but the purpose of congress, in this instance, was to make a settlement *legal without any survey*, and to protect the possession of those who went upon the land *before it was surveyed.* It was also the purpose to permit no homestead entry to be made unless there had *first* been an *actual settlement* upon the land. Congress made *actual settlement* a *prerequisite.* Because of this fact no land could be disposed of by the government unless to an *actual* settler. Whitaker was the *first* actual settler upon the island which he occupied until the state court drove him off of it. Therefore his *possession* is entitled to *protection* and this is independent of *any survey being made.*

I.

The stream between two islands is the natural boundary and neither islander can own farther than to the *center* of the *channel* between him and his immediate neighbor islander. This is elementary and no one disputes it. But the trouble with the Nebraska Supreme Court Commissioner was, that he seems to have *misunderstood the fact.* He seems to have thought that McBride and Kilgore owned lands coming down to the *outside shore.* He forgot that *they were islanders.* McBride and Kilgore claim that they or their grantors acquired the title. They claim that they acquired the title because they or their grantors acquired title to the center of the "channel" and they claim that the "channel" included all the streams designated by the common appellation "Mosquito Channel." To this we *say that calling two* or *more separate* things by *one name* does *not lessen the*

number of things; the number of things remains the same. If there is one channel between the shore and the island,it is one channel, although the channel on the other side of the island may be called by the *same name*. We say, therefore, that in no event can Kilgore hold title *beyond* the center of the *first* channel *next* to his lots; nor can McBride hold title beyond *the center* of the *first* channel *next* to his lot. This leaves the island free as to them in any event. But Kilgore is an *islander* and he can claim *no greater right* to Whitaker's island than Whitaker can claim to his island because both are islanders. What is true as to Kilgore is true as to McBride. One islander does not own *another islander's island*. The stream between the *two* islands is a *natural* boundary and neither islander can own farther than to the center of the channel. If the stream is navigable then the bed of it belongs to the state, except insofar as the United States may exercise control over it in the interest of commerce and navigation. In that event the owner of the shore owns only to the high-water mark.

II.

The Platte river is an inter-state stream. While it is very shallow yet, because of its exceeding width, it has been treated as a navigable stream. It is *meandered*. In theory it is a navigable stream. If the analogy holds good all the way through, then Kilgore owns no part of the channel; McBride owns no part of the channel. He only owns to high-water mark, just the same as if he owned land on a stream *actually navigable*. The state would therefore own the bed of the Platte river, and each islander would own to high-water mark and no farther. In the opinion delivered by the Nebraska Supreme court the learned Commissioner who wrote it, seems to entertain the idea that the state owns the bed of the Platte river. McBride v. Whitaker, 90 Neb. 966; and he is very

careful not to say anything which may be construed to preclude the state from also claiming the unsurveyed islands in it.

III.

One of the features of the Act which entitles it to special consideration is that while it permits the occupation of the land *before it is surveyed*, yet it does provide that the land *shall not* be offered for sale *until it is surveyed*. It must, therefore, be conceded that it could not be legally offered for sale while it was not surveyed, but at the same time it could be legally settled upon. Because the Act provides that the land shall not be offered for sale *until* it is surveyed the commissioner of the general land office was forbidden to offer it for sale, and could not legally sell it until *after it was surveyed*. *He* could *not sell it* nor could McBride or Kilgore *purchase it*, nor could either of their respective *grantors purchase it*. For this reason the owners of the surveyed lots in the immediate vicinity *were forbidden* to acquire title to the island because it was *not* surveyed. If the island in question could not be *sold until surveyed* then it has *not been sold because it has not been surveyed and no one has any title to it*. Horn v. Smith 159 U. S. 40. These islands ought to have been surveyed because it was according to instructions that they should be surveyed. Because they ought to have been surveyed it does not follow that a patent for the surveyed tracts carries with it the unsurveyed tracts. In the case of Horn v. Smith above cited the land unsurveyed was between a bayou and the river. The court said: "The patent conveyed only the land which is surveyed, and when it is clear from the plat and the survey that the plat surveyed terminates at a particular body of water, the patent *carried no land beyond it*."

IV.

The case of the Indiana R. R. Co., v. Butler, 159 U. S. is referred to by our adversaries as decisive of the law pertaining to the merits of this case. In that case the islands were in the main channel of Grand river. Four of these islands were surveyed at the time the *main land was surveyed.* About these four islands there was no controversy but the fifth island was the island of dispute. There was testimony in the case which tended to show that it was *not an island* at the time of the survey but a *mere speck of sandbar* which was covered by water most of the year. Grand river is a navigable river. Because the general government surrendered its control of the bed of the river to the state of Michigan upon the creation of that state, it could not therefore own the island if the island were *not in existence* at the time of such creation. There was no showing sufficient to establish the fact that the island was in existence at that time: therefore there was no evidence that the government *owned an island.* Unless the island was in existence at the time the *state was created* it could not be the property of the government, because at that time the *state became the owner of the bed of Grand River,* and if the island grew up *after that* time, the general government *could not have title to it.* And unless the government had title to the island it had nothing which it could convey to the railroad company; and the railroad company received nothing by reason of the conveyance. Michigan extends the rule of the common law concerning the rights of the shore owners to hold to the thread of the stream as to navigable streams but this does not conflict with the general government because the general government always surrenders its control of navigable waters to the state *as soon as the state is organized,* except that it retains a certain sort of control in the interest of commerce and navigation. As we

understand the rule it is this: Under navigable waters, the United States owns all the land by virtue of its sovereignty in trust for the people, but when the United States permits the formation of a new state it surrenders its sovereignty over the land under navigable waters to the *new state* except insofar as it may be necessary to maintain control over it for the *regulation of commerce.*

V.

No rule may be adopted by any state which shall take from the United States its property *without its consent*, and, therefore, whether it is upland or land under unnavigable water, it is not to be taken as disposed of unless there is the *clear intent* of such disposal manifest from the language of the conveyance by which the United States divested itself of its title.

VI.

Nebraska is forbidden by the "Enabling Act" to interfere with the primary disposal of the soil." For this reason it could adopt no rule concerning the bed of the streams that were navigable which would in any way interfere with the *sale of the public domain across which these streams run.*

VII.

It is clearly within the power of the Secretary of the Interior and the Commissioner of the General Land Office to direct the survey of the island in question—Kirwin v. Murphy, 23 Sup. Ct. Rep. 599.

VIII.

The United States owns the island.—United States v. Mission Rock Company, 23 Sup. Ct. Rep. 606.

IX.

There is no specific finding in this case that the United States has *abandoned* the island, nor does the Nebraska Supreme court find that the United States may not convey the island to *Whitaker* or to *any other person who may claim it.*

The Nebraska Supreme court has recently said: "Not until the legal title has passed from the United States will the courts inquire into the circumstances preceeding or attending the transfer for the purpose of deciding which of two conflicting claimants have the superior equity."—Henry S. McDonald v. U. P. R. R. Co., opinion delivered November 18, 1903, 97 N. W. 440. Notwithstanding this decision the effect of the action of the Nebraska Supreme court is to take possession of land *from Whitaker* and to *give* it to his adversaries. The above statement of the Nebraska Supreme court is fully justified.—Skefley v. Coman 91 U. S. 330; Rector v. Gibbon 111 U. S. 290.

X.

We contend that Whitaker may not be deprived of a lawful right because a *mere surveyor refuses* or *neglects* to *discharge his duty.*

When Congress directed the survey of the Fort Kearney Military Reservation it was the duty of the surveyors to survey it. All islands containing 21 acres or upwards should have been surveyed. By failing to survey this reservation the surveyors did not, certainly, exercise *judicial* functions. It being conce led that a surveyor cannot exercise judicial functions, it would seem that he cannot deprive the United States government of its property by *wilfully refusing* to act or by a *mere mistake.* If it shall be said that if the action of the Commissioner of the General Land office must first be favorable to the claim of

Whitaker and that Whitaker must first be allowed a homestead entry before he can get a patent, then we say that the land officers are never permitted to *determine the law of the case.* They are permitted to determine what the facts are between contesting claimants, but the United States courts most jealously reserve to themselves the right to *determine the law.* This being true it is for the United States courts to say (this court now) whether the Act of Congress providing for the survey and disposal of the land included within the Fort Kearney Military Reservation invested Whitaker with the right to occupy the *island in question,* and whether that act contemplated that by reason of *such occupation* he would be *entitled to the land.*

It may be that the United States Supreme court couldn't compel the Secretary of the Interior and the commissioner of the General Land office to survey lands and issue homestead receipts,but where there is an island within certain prescribed boundaries whose limits may beknown and which is *lawfully occupied* and which formerly belonged to the public domain and to which island the settler has obtained *certain legal rights* by reason of his settlement his continuous occupation and his compliance with the Act of Congress, we trust that the law will protect him in the right which he has acquired, and that it will prevent him from being "ousted" whatever may have been the negligence of the surveyors. We hopefully assert that if the Act in question authorized Whitaker to settle upon the island, then nobody but the United States of America can put him off.

XI.

We are aware of the contention that when the government desires to do so it will *do this* and it *will do that.* To this we say that the government is an intangible

thing. *The government is not in the flesh or in the spirit.* It has no volition of its own except as that will is expressed by its *servants*, its *agents* and its *officers*. The government is apathetic and never, until some one speaks up for it, does that which the people desire to have done. In this case there will be no hesitation to act as soon *as this court* shall declare what ought to be done. It is because of a misunderstanding of the views of this court that fifty to a hundred settlers are not provided with homes on the unsurveyed islands in the Fort Kearney Military Reservation. Courts do not assume the administration of the public land laws but they may declare their effect. Kirwin vs. Murphy, 23 Sup Ct. Rep. 599.

XII.

Our contention is that it is impossible for one to be a trespasser who attempts to claim land from the government by *occupying* it and who is *honestly* trying to obtain title to it under a law which looks to the *making of a settlement upon it.* The general policy of the government is in favor of the occupation of public lands to the end that they may be *taken for homes.* The opinion in this case concedes that the claim of McBride and the claim of Kilgore are each *illegal* so far as the *government is concerned.* The government is authorized, as the opinion declares, to convey the land to *any other person* or *persons*, or it may assert *its own right to it*, but *Whitaker* is to be treated as a *trespasser.* To this we say that their possession is illegal and their judgment is illegal and they *are trespassers as to the United States government.* Now, then, the practical question is whether this court will come to the rescue of *Whitaker* and all *others who are situated as he is situated.* In Koon v. Freels heirs, 16 Land Decisions 202, it was held that illegal possession by another party does not render a homestead entry invalid because such

possession existed at the date of the entry. In Leon v. Grijalva, 3 Land Decisions, 362, there was a settlement on public lands before the government survey was made. A little settlement established itself upon the banks of Mimbras river in New Mexico. Each settler had possession of a small strip of land extending back from the river. These people were squatters *seeking homes in a new country.* They built a public ditch to enable them to irrigate the tracts which they occupied. Two of their number built a mill. After the government survey was made, Grijalva undertook to obtain title to the land occupied by these people. *He wanted their ditch and their improvements and the land which they occupied.* He claimed the land under the United States homestead act and made proof and the local Land Office sustained his claim. The decision of the local Land Office was reversed by the Commissioner of the General Land Office who made an order that the contestants who had contested Grijalva's claim should have the preference right of entry for thirty days for so much land by legal subdivisions as might be in his actual occupation or free from the occupation of others, but would have no more rights than Grijalva had to enter any portion of the land occupied in good faith by others having their homes and improvements upon it, and claiming the same for their own exclusive use and benefit and who desired to enter the same under the public land laws. This decision very properly undertook to protect the *possession* and right of each settler to obtain title to the tract occupied and improved by him. The *principle* established in this case will give Mr. Whitaker the island.

In the case of Francisco v. Mirabel, 21 Land Decisions, 341 there was a village on the land homesteaded. The homesteader agreed to convey to each villager the land occupied by him. His entry was attacked on the ground that it was speculative and not within the provi-

sions of the statute because not made for his own exclusive use and benefit. The Secretary of the Interior sustained the entry thus showing the policy of the government to protect *the homes of all who seek to avail* themselves of the *bounty of the general government.*

Another case showing the same policy upon the part of the government is the case of Brown vs. Shields 21 Land Decisions, 101. In that case Shields had married an Indian woman and had lived with her upon the land in dispute in the Indian territory. Subsequently, when the land was opened for settlement under the Act of Congress he made a homestead entry upon the land which he occupied. Brown attacked his right to hold the land as a homestead upon the ground that he had occupied the land contrary to the inhibition in the Act of Congress and between the second day of March, 1889 and noon of the 22d day of April, 1889. Two other white men were similarly situated. They had also married Indian wives and had occupied and farmed land in the territory. The Act of Congress *excepted no one.* The Act provided that no one was allowed to occnpy the land in the inhibited district during the time above specified It was contended with great force that the Act of March 2, 1889, relative to the Oklahoma lands was operative on all alike and that the Act of Congress having made no exception in favor of any one, neither the Commissioner of the General Land offiee nor the Secretary of the Interior had any right to make any exception of this contestee, Peter Shields, and to hold that he and Benjamin Keith had rights superior to other white male citizens of the United States was to rise above the equal action of the law and to hold that a "squaw man" obtained by his marriage to an Indian woman greater rights than belonged to the plain unvarnished citizen who had been unfortunate enough to marry a white woman. Notwithstanding the seeming logic of this argument the Secretary of the Interior protected the homes of these

white men married to Indian wives and they were *allowed to hold the lands.* They were exempted from the operation of the *strict letter* of the law because of their previous residence on the land. In that case the Secretary cited numerous decisions.

XIII.

McBride and Kilgore had no lawful right *to fence up this land belonging to the United States.* The settlement made by Whitaker was lawful. In Stoddard v. Neigel, 7 Land Decision, 340, Neigel drove his wagon through the fence and went onto the land and lived in the wagon with his family until he could build a house. He offered to file a declaratory statement but his application was refused because the land was unsurveyed. It was urged on behalf of his adversary Stoddard that under the doctrine laid down in Atherton v. Fowler, 96 U. S. 513 "No rightful possession of the premises can be established by a settlement and the improvement on a tract of public land where the claimant forcibly entered upon the possesssion of one who had already settled upon improved and enclosed that tract." It was claimed that this doctrine invalidated Neigel's settlement. The Secretary held that this doctrine *did not apply* and that Neigel had a *right to drive through the fence.* If we apply the same doctrine to the case at bar, as the land belonged to the United States and is conceded to have belonged to the United States by the opinion of which we complain, then Whitaker had a *right* to go on the land and to build his dwelling house there and had a *right* to farm the land and to raise his children there. In any event McBride and Kilgore *did not own the island.* And the error of the Nebraska opinion is in assuming that McBride and Kilgore were entitled to the use of the land without owning it.

In Norton v. Westbrook, 9 Land Decisions, page 455 Norton had not only fenced the land but he had cultivated

50 acres of it, yet he was not entitled to it and the land was awarded to Westbrook.

Stovall v. Keenan, 12 Land Decisions, 382; Cartran v. Davis, 2 Land Decisions, 250.

The United States would seem to discourage the *unlawful enclosure of* lands which do not belong to those who *thus attempt to take and use them.* It would seem to be the right of any one who may be qualified to make a homestead entry to drive through the fence and occupy the land where one has *unlawfully usurped it.* He is entitled to make a *home for his family and himself.* The option of the Nebraska Supreme court does not determine that the United States government is barred by the trial of the case and does specifically determine and declare that any *future grantee* of the government may take title to the land; at the same time that it says this, IT FORCIBLY PUTS WHITAKER OFF OF THE LAND.

The decisions from which we have quoted shows the method of the government in doing business. They can only be valuable to this court because of the fact that they *show such Method.* These decisions, however, *come from the people.* They are not statements of law. They are simply *methods of doing business.* But they show that it is the *political policy* of the government to protect settlers in good faith who endeavor to *establish homes upon the public lands.* In Grand Rapids & Indiana R. R. Co., v. Butler, 159 U. S. 87, the court said:

"We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyors to decline to survey this particular spot as an island. There is nothing to indicate the mistake or fraud and the government has never taken any steps predicated on any such theory as that, and did not survey the so-called island No. 5 until 25 years after the survey of 1831, and nearly 20 years after that of 1837. The Supreme court of Michigan was right in holding that what-

ever there was in this conformation passed under the grant to Lyon and Hastings."

It will be remembered that Lyon and Hastings were owners of the main land coming *down to the shore.* It will also be remembered that in Michigan, although the streams are navigable the rule is that the owner owns to the *center of the channel.* Now, this so-called island at the time it was surveyed 25 years after the original survey, only contained 2.56 acres. It was utterly *insignificant in size.* It was in a stream of depth and volume where there was every likelihood of a change in its conformation by reason of the *strength* and *depth* of the current. In that case the surveyor was instructed to survey "islands." This was not an island because it was a *sandbar covered with water the greater part of the year.* But in the case at bar there are no changes in the formation of the island and this island contains nearly 48 acres. It was not a speck of *sandbar* at the time of the survey, and it was just as it is now, and it has always been *good agricultural land.* In the Michigan case as the owner of the *shore* land owned the *bed* of the *river* to the *center* of the *channel* he would own any island that rose above the surface *after* he obtained his title. There is nothing whatever of that sort in the case at bar. *This island in the case at bar was just the same at the time of the survey as it is now.* It is not a speck of *sandbar* rising up out of the waves. It is a very substantial island that has probably been there just as it is now for the last *two or three hundred years.*

In Kirwin v. Murphy 23 Sup. Ct. Rep. 599 there was a case in some respects like this except in that case the land department acted, while in this case the land department is slow to act because of the decision of the Nebraska Supreme Court. In that case there was a lake. The plaintiff owned certain fractional lots supposed to ex-

tend to this lake. The plaintiff sought to enjoin the threatened survey of the land between the *meander line of the survey* and the *actual water line of the lake.* The plaintiff claimed that he bought the land for the purpose of obtaining the pine timber growing upon it and that the lake was navigable and that if the surveyor had perpetrated a fraud upon the government in failing to accurately establish the meander line, then that, he, the plaintiff, had not participated in the fraud, and that he owed to the *water line* and regardless of the *meander line.* The Circuit court perpetually enjoined the survey and the Circuit court of Appeals affirmed the judgment of the court below. The United States Supreme Court reversed the decree of the Court of Appeals and the decree of the Circuit court and remanded the case to the Circuit court with directions to dismiss the plaintiff's bill.

If, in that case, there was a right to survey *between the meander line* and the *water line of the lake,* there is a right to survey the island in this case. *In both cases the United States owns land which is not surveyed.*

In United States v. Mission Rock Co., 23 Sup. Ct. Rep. 606 there were two rocks out in San Francisco Bay. The land on the shore had been surveyed and sold down to within less than a half mile of the rocks. Under the rule by which our friends on the other side attempt to claim this island the purchasers of the fractional lots abutting upon San Francisco bay would have been entitled to hold the rocks. They could have claimed the rocks as a continuation of their fractional lots. The rocks had in no way been reserved by the government. Somebody conceived the idea that these two rocks were valuable as a *center* about which to construct a dock. The rocks were conveyed by a private individual who first began the enterprise to a company and many thousand tons of rock were dumped about these rocks until a good landing place

was made. The president of the United States, then William McKinley, made an order *reserving these rocks for naval purposes.* In an action between the United States and the Mission Rock Co., it was finally determined that the United States *owned the rocks* and that it had not parted with its title. It was a fact that the United States had no claim to the land under San Francisco bay. That belonged to the state of California. It could only have been held the United States owned the rocks because there was no *affirmative* evidence in any deed of conveyance that it had conveyed them. The same rule as applied to McBride will confine him to lot 8. The same rule applied to Kilgore will confine him to lots 6 and 7 and it will declare that the island in question *belongs to the United States subject only to Whitaker's right of occupation.*

In Keen v. Calumet Canal Co. Improvement Co. the Canal & Improvement Company brought suit to quiet title in the state court of Indiana. It got judgment (150 Ind. 699; 50 N. E. Rep., 85) and the case was taken to the Supreme court of the United States by writ of error. The Calumet Company claimed title from the state of Indiana and the state got its title under the Swamp Land Act and patents of the United States purporting to be in pursuance of that act, and referring to the official plat of survey made in 1834. The patent set forth: "The whole of fractional section" enumerated and bordering on the water in which section rises the disputed land. It is not denied that the company got the land above the water line as shown in the plat referred to but it denied that it got more. The water had been receding and drying up. The defendants Keen et al, set up a later survey in 1875 of the land which was covered by water in 1834 and is covered to a less extent still, and patent from the United States in pursuance of this later survey for tracts below the original water line. They denied that the state ever owned this land, or, if it did, that it conveyed it and they alleged

the later survey to be conclusive. The court held that the making of a meander line has *no certain* significance. French Glenn Live Stock Co. v. Springer, 185 U. S. 47; 46 L. Ed. 800; 22 Sup. Ct. Rep. 563. It does not necessarily import that the tract on the other side of it is *not surveyed* or will not pass by a conveyance of the upland shown by the plat to border on the lake. It is not always a boundary. St. Paul R. R. Co. v. Schurmeir, 7 Wall. 272; 19 L. Ed. 74; Hardin v. Jordan, 140 U. S. 371; Horn v. Smith, 159 U. S., 40.

In this case its immediate import was only to indicate the contour of the lake Among other things the court said: "The land was settled as swamp and overflowed lands by the state. It not appearing otherwise, the selection must be presumed to have included the land overflowed, and if so, it was confirmed to the state by the act of March 3, 1857. Chapter 117 (11 Stat. at Large, 251; Rev. Stat. Sec. 14-84, U. S. Com. Stat. 1901, 1588.) The land covered by the water, at least, was surveyed so that the identification of the submerged portion was absolute. We are of the opinion that the state of Indiana got title to the whole land in dispute. If the state of Indiana got title it gave one. The re-survey by the United States in 1874 does not affect the Calumet Company's right; as the United States had already conveyed the land, it had no jurisdiction to intermeddle with them in the form of a second survey. Citing Hardin v. Jordan 140 U. S., 371, and other cases. But it will be noticed in this case cited that the land was selected as swamp and overflowed land. The purpose of the United States was to allow the state to obtain title to these swamp lands and overflowed lands. The court finds that the plat and field notes show that the section and dividing lines were clearly marked off, and posts set, so that whether the land was *submerged* or whether it was *uncovered* made no difference as the purpose was to convey all the land contained in the *section*

enumerated whether submerged or not.

The Circuit court of the United States decided as the United States had *already conveyed* the lands it had no right to intermeddle with them in the form of a second survey. Hardin v. Jordan 140 U. S., 371; 35 L. Ed 428; 11 Sup. Ct. Rep. 808; Grand Rapids & I. R. Co. v. Butler 159 U. S. 87; 40 L. Ed. 85; 15 Sup. Ct. Rep. 991; St. P. & P. R. Co. v. Schumeir, 7 Wall, 272; 19 L. Ed. 74.

But that case is a very different case from this one. In that case it was the purpose of the government to convey all the land within certain boundaries whether surveyed or not, but in this case it was not the purpose of the government to convey *other lands than those surveyed. The island in question was not surveyed.* In the case cited, the purpose of the government was to convey all the land indicated and lying within the *outside* lines of the section without regard to whether the *inside* lines had been run or not, and without regard to whether the land so conveyed was submerged or not. The purpose was to convey swamp and overflowed lands to the state. Because it did not appear otherwise the court held that the selection "must be presumed to have included the land overflowed." The court calls attention to the fact that the section lines and dividing lines were clearly marked off and the posts set.

XIV.

We desire to call the attention of the court to the fact that the island which was occupied by Whitaker is *much longer than the lots to* which McBride and Kilgore seek to attach to it. A part of this island claimed by Whitaker is in section 6 T. 8, R. 16 W., and part in the S. E. quarter sec. 12, T. 8 R. 12, W., and a part in the S. W. quarter of section 12 T. 8 R. 15 W., and a part of N. E. quarter section 13, T. 8 R. 15, W.; and a part in the N. W. quarter 13, T. 8 R. 15 W. It begins *above the McBride and Kil-*

gore lands and extends below them.

XV.

The special Act of Congress which provided for the survey and sale of the Fort Kearney Military Reservation provided tnat *no person* might acquire title to any part of said Reservation unless he *actually resided upon the land.* Whitaker was the *first settler upon this island.* It was never occupied by *any other* settler than Whitaker. As the Act of Congress is a special act and provided that *only settlers* could acquire the land, it was simply *impossible* that McBride or Kilgore's grantors could have acquired title to this island.

XVI.

In Lamers vs. Nissen, 4 Neb. 245, it was held that "the mere fact that it (the meander iine) that is run and designated upon the plat as a meander line is not conclusive against the government." An entry of government land bounded by a meander line does not include land lying at the time between such meander line and the bank of the river. In that case the original survey described the *meander* line as running along the bank of the Missouri river, and no reference was made to any land lying *outside* of the meander line. As a matter of fact the meander line was run along the bank of an *ancient slough* and *not along the bank of the river.* At the time the survey was made the land was *in existence.* In that respect *that case is the same as this one.*

In the case at bar in respect to the things sought to be done by our adversaries, it is not unlike the case of Bissell v. Fletcher, 27 Neb. 582. In that case the plaintiff owned lot 3 in section 31 containing 52.60 acres. He undertook to claim 117 acres more. The Nebraska Supreme Court held "that *a mistake* was made in the *original plat*

of the government survey (see page 586). This seems to have been fully sustained by the evidence. The plaintiff claimed that lot 3 *extended to the river*. From the statement made (there was a rehearing) in the 19 Nebraska, 725, the plat showed "that the S. W. corner of the lot extended to the north channel of the Republican river. There was also testimony tending to show the *meander line* between the river and the south line of said tract." The defendant was the owner of lots 6 and 7 lying south of lot 3 and between it and the river; and the contention of the plaintiff was that lot 3 *extended to the river*. Notwithstanding the fact that lot 3 contained all the land that plaintiff purchased and paid for, he *contended that he owned to the river*. In the second opinion, Judge Maxwell, said that plaintiff "is already in possession of *all the land that he purchased* and that the government sold to him.—2d opinion, 27 Neb., 585. McBride and Kilgore each have *all the land their patents call for*. In this respect they *are entitled to nothing else*, if the Supreme court of Nebraska is to be followed in the case cited.

In Wiggenhorn v. Kountz, 23 Neb. 690 an island in the Platte river was partly washed away. The *upper* part of the island was taken, and there was a sudden formation of land on the *lower* end of the island. Upon this lower end of the island there was a growth of trees. These trees were taken by the defendant Wiggenhorn and by the plaintiff in error. Wiggenhorn, et al were sued by Kountz in the court below *for taking the trees*. They defended upon the ground that the land suddenly formed at the lower end of the island belonged to the parties owning the *main land bordering on the river near said island*." The Nebraska Supreme Court held "in the case under consideration it is clearly shown that there is a clearly defined channel of the river on *each side* between the *main land* and *the island*. The ground of the main land, therefore, would, at the most, merely extend to the *center* of the

thread of the *stream between the shore and the island*, so that in *no event* could an owner of the main land claim an *interest in the island*." Apply this principle.

XVII.

All the parties agree and the evidence shows that the islands are *unsurveyed*. This being true the islands *cannot* be a part of the lots owned by McBride and Kilgore. The boundaries of these lots are determined by reason of the fact that *they are unsurveyed*. The *meander line* is *not* their boundary. *The stream is their boundary*. In this case the plat shows the stream on the *north side* to be *one boundary* and the stream on the *south side* to be *the other boundary*. A boundary is a *natural division* where there *is a natural division*. It is a stream, where the *stream is indicated as the boundary*. *Meander lines* are *not* made as *boundaries*, but they *point* to the boundary and they are made to estimate the surface land from them. Sphung v. Moore, 120 Ind. 356.

In Horn v. Murphy, 159 U. S., supra, Justice Brewer in commenting upon *omission* to make a survey of a tract of land *west* of a bayou and *between the main body* of the Indian river said: "It is unnecessary to speculate *why* it was not made. It may have been a *mere oversight*, or it may have been because the surveyor thought that the action of the water would soon *wash the low land away*; but *whatever* the reason, it is obvious that *no survey* was made of *that body of land*, and the boundary line fixed *was the water line* of the bayou."

XVIII.

In East Omaha Land Co. (Ia. 1900) 90 N. W. 706, the question was whether an island which sprung up in the Missouri river accrued to government lot No. 2. The

court said: "Whether it be on one side or the other of the *thread* of the stream, the island when formed is *an accretion* to the *soil in the bed of the river.* The riparian owner does *not take* the accretion for the reason that it was *not added to his land.*" Hallman v. Hodges 84 N. W. 950; City of Victoria v. Schatt, (Tex. Civil Appeals) 29 S. W. 681; Conley v. Golden, 117 Mo. 33; 23 S. W. 104; 21 L. R. A. 300; Harris v. Brook, 53 Am. Rep. 215; People v. Warner (Mich.) 74 N. W. 705; Indiana v. Kentucky 136 U. S. 479; 10 Sup. Ct. 1051. In the Iowa case, first above cited, the court said that: "The island when formed was an accretion to the soil *in the bed of the river*, and the owner of *such bed* became *the owner of the accretion.*"

In the Missouri case the court said. "It makes no difference in principle that the island in these cases have been surveyed and disposed of by the United States. The riparian owner *would not take the accretion* for the reason that it was *not added* to his land."

While the cases cited in this paragraph are not *directly* in point as to the case at bar there was no question of any accretion springing up in the bed of the river, yet nevertheless these cases establish *a principle* proper to be considered. It is that the owner of the bank *does not own an island* which may spring up in the stream *because he owns the bank.* If the riparian owner owns the island that springs up in a stream, it is because in the first place he owns the land *under* the water to the center of the stream, and, therefore, if an island rises up on *his land* he owns it. But, if the land under the stream belongs to the state, he does not own it. In this case the United States owned the island in controversey. *It was already there.* It belonged to the *United States* as much as *any island on either side of it.* Therefore, when the Udited States sold the islands *on either side* of this island, it simply sold to *the center of the channel next* to the island which it sold. When it sold

to McBride it sold to the center of the channel on the *south side* of the island in controversy. When it sold to Kilgore or to Kilgore's grantors it sold to the *center* of the channel on the *north side of the island.* It did not *undertake to sell* the island which *was not surveyed* and *was not included in the grant to McBride or to Kilgore's grantor.*

XIX.

The State Court has no moral or legal right to attempt to oust the United States Land Department from the discharge of its duties. If it has no *jurisdiction,* then its judgment *is void.* If void it may be attacked collaterally or directly. It affects nothing and creates nothing. It should be considered as if there had never been any attempt to render it, and as if it had never been pronounced or written. Black on Judgments Sec. 170. Freeman on Judgments Sec. 117. The Nebraska Supreme Court does not hesitate to declare *its own judgment void.* Johnson v. Parrotte 46 Neb. 51. Nor does it hesitate to declare the judgment of the district court void under proper circumstances. Banking House of A. Castetter v. Dukes (Neb) 97 N. W. 805. The island *actually does belong to the United States.* The learned Nebraska Supreme Court Commissioner admits the right of the government to *assert title to it* and *to claim it for itself or for any grantee,* but says that between Whitaker on the *one side,* and McBride and Kilgore *on the other,* it is the opinion of the Commissioner, that for the time being and until the further order of the court, or the further order of the United States Land Department, or the further order of the United States Circuit Court, or the further order of some lawful tribunal of the United States assuming to exercise jurisdiction and control over the island in controversy, it *belongs to McBride and Kilgore.* The effect of this decision would seem to be to say, "We *refuse* to consider the question. The land may belong to the United

States and the judgment *may be void*, but even if the land *does belong* to the United States, and even if the judgment *is void*, we are going to give the island to McBride and Kilgore, although the United States may afterwards give it to Whitaker, and we refuse *to say whether our judgment is void.*"

On behalf of the Nebraska Supreme Court Commissioner, who wrote the court's opinion, it is only fair to say that in the briefs filed in support of Whitaker's original contention, there is *no reference* to the local Act of Congress, providing for the survey and sale of the Fort Kearney Military Reservation. But in *any event* the decision is untenable because it permits McBride and Kilgore to recover against Whitaker *without themselves owning the land.* They make the action to *quiet title*, perform the office of an *action of ejectment.*

If this can be done then there must be the same foundation upon which to rest the judgment. This being so they must show title.

"The plaintiff in an action of ejectment must rely for a recovery upon the *strength of his own title* and *not* on the want of title in his adversary." Abbott v. Coats, 86 N. W. (Neb.) 1058; Frazer v. Nelson, (Mass. 1901) 61 N. E. 40; Anniston City Land Co. v. Edmonson (Ala 1900) 30 So. 61; Bert v. Florida (Dec. 1901), 31 So., 265; Winters v. Hainer, 64 S. W. 44 (Tenn.)

An action to recover possession of real property can only be brought by the *holders* of the *legal title.*

Hern v. Jones, 64 S. W., (Tenn. Ch. App. 1900) 344, Sutton v. Clark, 33 S. E., 150; McCrellis v. Wells, 64 S. W.; 293; Remsen v. Hyams, 71 N. Y., 1002; Perrion v. Peck, 60 N. E., 1118, 167 N. Y., 582; Hall v. Morgan, 63 S. W., 506; Robert v. Haines, 38 S. E., 119, 112 Ga. 842, Adams v. Johnson, 65 Pac. 662, Stowel v. Spencer, 60 N. E., 300,

Sanford v. Herron, 61 S. W., 839; 161 Mo. 176, Illinois Steel Co. v. Dillut, 85 N. W., 842, Cowdry v. Johnson, 39 S. E., 478, 113 Ga- 981.

Where the defendant is *in possession of land not under color of title*, the plaintiff cannot eject him therefrom without *showing title* and *right of possession in himself.* McVey v. Cal., 60 S. W., 1034 (Mo. 1901.)

But how can McBride and Kilgore quiet title when they have no title to quiet? How can they quiet title in themselves when the court considers that they *have no title* and that the title is *in the United States*?

In Anniston City Land Company v. Edmondson (Ala.) (1900) 30 So. 61, the court held the following charge to the jury to be correct: "It is a clear proposition of law that to entitle the plaintiff to recover, it must show a better title to the land in dispute than the defendant, and upon this proposition the burden of proof rests upon the plaintiff. And unless the jury can say from the evidence in the case that the *plaintiff has shown a better title* to the land in controversy than the defendant, it is *not entitled to recover*."

In the same case it was held "That the plaintiff must recover on the strength of his own right is also a correct statement of the law."

To the same effect is McLean v. Arends (Ala. 1897) 22 So. 500.

In Burt v. Florida Southern Ry. Co. (Fla. Dec. 19, 1901) 31 So. 265, the court held that "A plaintiff in ejectment must recover upon the strength of his own title and not upon the weakness of his adversaries."

The plaintiff must recover, if at all, on the strength of his own title. Wilson v. Parrigo, 155 Ind. 570; 58 N. E. 847; Creech v. Childers, 166 Mo. 338; 56 S. W. 1106; Smith v. Haskins, 45 At. 741; Stith v. Cobb, Ala. 1900 28

So. 402; Hammond v. Shepard, 57 N. E., 867; (Ill. 1900).

XX.

In Nebraska we have three supreme court judges, and then the legislature provides, from time to time, for the employment of clerks to help the judges. These clerks hear arguments and write opinions. The court proper never knows anything of the contents of these opinions, until they are presented in the consultation room and hurriedly read. These clerks are called commissioners. At the time the opinion was written in this case there were nine of these commissioners. Each set of three commissioners formed a court. The nine commissioners formed three courts, and the three judges formed a fourth court. There would be four courts or departments hearing arguments at once. Because of this method, which seems to be unsatisfactory, the court proper, that is the tribunal formed by the *three judges*, rarely heard arguments, except in the most important cases and in criminal cases. The opinion of the commissioner would be approved and become the opinion of the court *without the court itself, having heard any argument upon the questions involved in the case*, and without the court having *made any personal examination of the authorities cited*. The system is not a good one, but it is a device to enable the court to dispatch the business and seems necessary, because the constitution of 1875, providing for only three judges, was *long ago out-grown*. While the commissioners are selected by the judges from the bar, and generally the Act provides that the three political parties in Nebraska shall be represented, yet there is not that homogeneity, which one might expect from a body of men of equal size, either elected or appointed and remaining *continuously upon the bench for a full term of six years or longer*. It is too much like a husking bee.

XXI.

The Act of Congress recognizing the validity of the settlement upon the Fort Kearney Military Reservation and directing the survey and sale of the land, is contained in the 19th U. S. Statutes at large, page 94, and is as follows:

"Whereas the tract of land in the State of Nebraska, known as the Fort Kearney Military Reservation is no longer needed or used for military purposes, and has been abandoned by the military authorities: Therefore, Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That it shall be the duty of the Secretary of the Interior to cause said tract of land to be surveyed, sectionized and subdivided as other public lands, and after said survey to offer said land to *actual settlers only* at minimum price under and in accordance with the provisions of the Homestead law; Provided, That if any person has *made permanent improvments upon said land*, prior to the first day of June, 1876, (*being an actual settler thereon*) has exhausted his right to make a homestead entry, such person or his heirs may enter one quarter section of said land under the provisions of the Pre-emption laws; and provided further, That the heirs of every deceased person who had made settlement and improvement as above described prior to June 1st, 1876, may complete the pre-emption or Homestead entry of the person to deceased.

Sec. 2. That the sum of Three Thousand Dollars or so much thereof as may be necessary is hereby appropriated out of any moneys in the Treasury, not otherwise appropriated, for the purpose of carrying out the provisions of this Act. Approved July 21, 1876."

At the time this Act was passed the country all about the Reservation was fairly well settled. Kearney, the county seat of Buffalo county, within three miles of the reservation, was a thriving town of three thousand people or more. It had a daily newspaper, two weekly newspapers, and two banks and three hotels. It had been the

Junction of the C. B. & Q. R. R. with the Union Pacific Railroad for four years. Gibbon and Lowell were each close to the Reservation and were thriving country towns, each with a population of from four hundred to five hundred people. *Many persons had already settled upon the Reservation, and the Act was passed to encourage more persons to settle upon it.* The Act recites the abandonment for military purposes. The land was, by the express terms of the Act, to be offered *to actual settlers only.* The Act itself recognizes the fact that actual settlers had already gone upon the tract and had made valuable improvements. Were they trespassers? If so, the government was kind to them, because it protected their settlement and their property. That the Act looked to other *settlements* and *other improvemnets*, is beyond question.

XXII.

Sec. 709 of the U. S. Rev. Stat. provides that

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * may be re-examined and reversed or affirmed in the Supreme court upon a writ of error." (See Bates on Fed. Equity Procedure, page 34).

The right of review exists. Cohens v. Virginia, 6 Wheat. 264. Hans v. Louisiana, 134 U. S. 1; Leisy v. Hardin, 165 U. S. 100.

The writ of error was issued to the Supreme court of the state in each of the following cases: Crescent City Etc. Co. v. Butchers' Union Etc. Co., 120 U. S. 141; Lawyers Ed. Book 30, page 614; Glasgow v. Baker, 128 U. S. p. 560; Lawyers Ed. Book 32, page 513; Chicago & Alton R. R. Co. v. Wiggins Perry Co. 119 U. S. 615; Lawyers Ed. Book 30, page 519; Lehigh Water Co. v. Eaton 121 U. S., 388, Lawyers Ed. Book 30, page 1059. New Orleans

Water Works Co. v. Louisiana Sugar Refining Co. 125 U. S., 18, L. Ed. 31, 607; Cregor v. Shelby & R. R. Co. 125 U. S., 39; L. Ed. Book 31, page 675.

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Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 185.

GEO. S. WHITAKER AND MARY L. WHITAKER,
PLAINTIFFS IN ERROR,

v.

THOMAS McBRIDE AND WILLIAM H. KILGORE,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

E. R. BROWN AND
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1891

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 135.

GEO. S. WHITAKER AND MARY I. WHITAKER,
PLAINTIFFS IN ERROR,

v.

THOMAS McBRIDE AND WILLIAM H. KILGORE,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

The question in this case is whether the purchaser from the Government of part of an island has become by such purchase the owner of the *next island*, which he did not purchase or intend to purchase, and which the Government did not sell or intend to sell to him. While the question might seem to imply a negative answer, and did receive such an answer from the district court of the county in which the case was tried, yet the Nebraska supreme court has answered it in the affirmative.

The property rights of the plaintiffs in error originated under the act of Congress of July 21, 1876 (U. S. Statutes at Large, vol. 19, page 94), and the United States homestead laws. When this act was passed, and for two or three years before that time, many persons were living upon the Fort Kearney military reservation, being the tract of land referred to in the act. Many other persons were expected to settle upon this reservation. IT WAS CONSIDERED BY THE SETTLERS THEMSELVES THAT THE MAN WHO SETTLED SHOULD BE PROTECTED IN HIS SETTLEMENT, ALTHOUGH THE LAND HAD NOT YET BEEN SURVEYED AND OFFERED FOR SALE. CONGRESS ADOPTED THIS VIEW AND PASSED THE ACT IN QUESTION.

The island in controversy is part of the said Fort Kearney military reservation. The act passed authorized the Secretary of the Interior to cause said tract of land to be surveyed and offered to actual settlers only at minimum price and in accordance with the provisions of the homestead laws, and if any person, being an actual settler and having exhausted his right to make a homestead entry, has made permanent improvements upon said land, such person or his heirs may enter one-quarter section under the pre-emption law and the heirs of every deceased person who made settlement prior to June 1, 1876, make complete the pre-emption or homestead entry of the person deceased. There is an exact copy of the act on page 37 of our first brief. Here we have undertaken to give the substance.

THE ISLAND IN DISPUTE WAS NEVER SURVEYED. MANY OTHER ISLANDS IN THE SAME RESERVATION AND IN THE SAME VICINITY HAVE NOT BEEN SURVEYED. The Government surveyors seem to have had a horror of wet feet. At any rate, they did not spend much time surveying islands in the Fort Kearney military reservation. There would be a few lots surveyed and sold, and then the purchasers would fence up everything in sight. OF COURSE THEY FENCED UP THE ISLANDS THEY DID NOT BUY ALONG WITH WHAT THEY ACTUALLY BOUGHT. The defendant in error Kilgore was one of

these. McBride is his servant and ally. Ostensibly McBride and Kilgore were arrayed against each other. Even in the Nebraska supreme court they were still filing separate briefs. HERE FOR THE FIRST TIME THEY UNITE IN A JOINT BRIEF.

Whitaker, the plaintiff in error, came along looking for a homestead. This was in April, 1897. When he learned that Kilgore had fenced in a number of these unsurveyed islands, which he did not own and which belonged to the Government, and that Kilgore and McBride were claiming the island in question without owning it, and that the island actually belonged to the United States and was subject to settlement as a part of the public domain, *he stopped and proceeded to build a house for the wife and children on this particular island.* Up to date he has been unable to get the Land Department of the United States to give him a homestead receipt. IT CANNOT DO SO IN ANY EVENT UNTIL THE LAND IS SURVEYED, BUT WHITAKER IS WILLING TO PAY THE EXPENSE OF A SURVEY, AND WHENEVER THIS COURT SAYS THAT WHITAKER WAS AUTHORIZED TO MAKE SETTLEMENT UNDER THE ACT OF CONGRESS OF JULY 21, 1876, OR THAT MCBRIDE AND KILGORE CANNOT MAINTAIN THEIR ACTION AGAINST HIM WITHOUT OWNING TITLE TO THE LAND AND RECOVERING UPON THE STRENGTH OF THEIR OWN TITLE, THEN THE LAND DEPARTMENT WILL ORDER A SURVEY.

What Whitaker wants is simply a fair apportionment of the public domain *which shall recognize his right along with the other settlers who went on the Fort Kearney reservation.* On June 27, 1898, McBride filed his petition in the district court of Buffalo county against the plaintiffs in error in this case, Geo. W. Whitaker and his wife, and against Kilgore and his wife. He alleged the island was unsurveyed, but claimed it to be a part of his lots, 8 in section 12, and 5 in section 13, but separated from the main body of the land comprising said lots by a narrow channel of the Platte river, known as Mosquito channel, but all constituting the riparian accretion

to said lots. As to Whitaker and his wife, he alleged that they were wrongfully claiming to own the premises as their own, and as to Kilgore and his wife he alleged that they claimed an interest as a riparian accretion "to land owned by them lying immediately north of said island" (printed Record, page 2). Kilgore claimed ownership of the island by accretion to his lots (printed Record, page 5). Whitaker and wife answered, no jurisdiction of subject-matter, no case in equity; that plaintiff has an adequate remedy at law; that Whitaker is of lawful age, the head of a family, and a citizen of the United States and of the State of Nebraska; that he had never used his homestead-right, entry upon the island to acquire it as a homestead, and that no part of the lots acquired by McBride and Kilgore was acquired by accretion or reliction, island never entered upon or settled upon and proved up on ownership of the United States, and right of occupancy of defendant Whitaker (printed Record, pages 7, 8, 9, and 10).

The taking of evidence was finished in February, 1899. FOUR MONTHS AFTERWARD, AND JUST BEFORE THE COURT FILED ITS JUDGMENT, MCBRIDE AMENDED HIS PETITION AND KILGORE AMENDED HIS CROSS-BILL. McBride amended so as to state a *new ground of ownership*. In his former petition he alleged "riparian accretion" to his lots. In the amended petition he said there was formed in Mosquito channel "A low wet island or middle ground, which in dry times and low stage of water in the Platte river separates the said Mosquito channel into two streams or channels which unite both above and below the said island or middle ground." Here is a seeming attempt to show that the Mosquito channel ordinarily covered the island and that it *only rose out of the channel and divided the stream in a dry time. There is absolutely no testimony to justify this contention. The testimony is all contained in the printed record and shows that this island was as high as any other island in the vicinity.* While the case was not tried on this issue, the island in question is

quite as high as the lots which are a part of islands on either side of it. By reason of the fact that water is taken out of the Platte river for irrigation purposes in Colorado and Nebraska, there is not quite so much water at the time of the June rise, but there never were any floods as high up the Platte river as the location of this island. The island in question has always been suitable for agriculture since before the survey was made in the spring of 1877.

It was also alleged in the said amended petition that the said McBride was the grantee of the Government of the United States, which granted him lot 8, in section 12, and lot 5, in section 13, without any reservation, and the said McBride alleged that by virtue of said grant he took to the center of the thread of the stream of said Mosquito channel. Said new petition also alleged that the Government had granted to the defendant Kilgore lots 6 and 7, in section 12, and lot 2, in section 13, without any reservation of said island or middle ground, so that the bed of the said Mosquito channel and the island therein and middle ground thereof are owned by the plaintiff McBride and the defendant Kilgore. This allegation is not supported by the evidence for the reason that the plat shows that McBride and Kilgore each own fractional lots, which extend down to the channels of two streams. One channel skirts along the *south side* of the island in controversy, and the plat shows that McBride's island goes up to the edge of this channel, or to the center of it, as the law may be. The other channel is shown by the plat to skirt along the *north side* of the island in controversy and on the *south side* of the lots belonging to Kilgore's lots 6 and 7. Nor is there any testimony in the case which shows that Kilgore had a less number of acres than he purchased or that McBride had a less number of acres than he purchased.

It was also alleged in this new answer "that the meander line, as shown by the field-notes and map of said Government survey, do not coincide with the banks of said Mos-

quito channel as they now exist, and there exists a controversy between the plaintiff and defendant Kilgore as to where the said boundary line should be located," and there is no testimony which tends to show that there has been any change in the banks of "Mosquito channel."

The next paragraph in this amended petition alleges that the island has become drier by reason of the damming of channels further up the stream and subsidence and recession of the waters of the Platte river. This statement is undoubtedly true for the reason that there is less water in the Platte river because of irrigation than there used to be, *but the Platte river has never been subject to overflows at Kearney or anywhere in the vicinity of this island, and the island has always been valuable for pasture and never too wet for agriculture.* In this same paragraph it is alleged that Whitaker moved from the island about the 1st of April, 1897, but it is claimed that he and his wife have no right, "title, or claim of any kind to said land and are mere trespassers."

To this we say that they cannot be trespassers as to McBride and Kilgore, because McBride and Kilgore do not own the land. As it was never surveyed and was above 21 acres and ought to have been surveyed, it could not be sold to any one and McBride and Kilgore did not buy it or any part of it. Nor is there any pretense that they recover upon the strength of their own title. As to whether Whitaker and his wife are trespassers, so far as the United States is concerned, depends upon the *construction* to be given the local act, which *authorized the settlement* of the Fort Kearney reservation *and its survey and sale.* If that act was passed to encourage settlement, then Whitaker and his wife *rightfully settled upon the land,* but whether McBride and Kilgore *can put them off depends upon whether they own the land.* Whether the United States wants Whitaker and his wife to move off the land is not suggested or discussed in any way by our friends. *It is one of our contentions that when the United States wants Whitaker and his wife to move off the land that it will notify them of that fact.*

Kilgore's answer is along the same line as the petition of McBride.

Kilgore alleges in the fourth paragraph of his answer "That the meander line of said river is along the north bank, as indicated by the field notes and map does not coincide with the actual lines of said north bank, as it now exists, but cross said bank and include in the boundaries of said lot a large part of said island or middle ground." *To this we say that Kilgore can in no event claim beyond the center of the first channel next to his lots, and it is wholly immaterial where the meander line of Kilgore's lots may be. In any event, it only points to the actual channel and cannot go beyond it.* The same is true of the meander line of McBride's lot. In no event can such meander line indicate a boundary of McBride's lots north of the stream on which said lots abut. Where there is a natural division, that is the boundary. *If it is a stream that is the natural division, then the meander line points to it.* The meander line *points* to the natural *boundary where there is a natural boundary* and is made to estimate the surface of the land from (Sphung *v.* Moore, 120 Ind., 356).

It is in the testimony in this case and in the pleadings, and it is conceded by everybody, that the island was not surveyed. *This being the case, meander lines made at the time of the survey of the lots sold were made to indicate the boundaries of those lots or to point to them. They were not made for the island in question, for the island was not surveyed.*

On the 13th day of June, 1899, the district court of Buffalo county, Nebraska, rendered its judgment dismissing the said petition of the plaintiff McBride and the cross-petition of the said defendant Kilgore, and declared that the said McBride and the said Kilgore had no cause of action against the Whitakers. The material findings of fact in said judgment of the district court are based upon the evidence and are fully established by it. Among other of the findings of the said district court was the finding that the island con-

tained about 22 acres (it is really nearly 48), and was "entirely surrounded by certain channels of the Platte river."

This last finding shows that the land cultivated was really an island, and that it was not submerged and had no intangible and fleeting character. The next finding is along the same line. "The court further finds that said channels bordering said tract in dispute, the one being on the south of lots 6 and 7 and the other on the *north of lot 8, are substantially the same now as they were at the time the original survey was made, and that said channels are substantially as shown by the plaintiff's plat marked Exhibit 'A.'" This finding is important, because it shows that the channels are the same now as at the original survey* (printed Record, page 17).

The court further finds that the *south line* of said lots 6 and 7 is the channel line, as shown in Exhibit A, and that the *north line* of said lot 8 is the channel bounding it on the north, as shown in said Exhibit "A." *This finding clearly establishes the boundaries of the lots claimed by McBride and Kilgore respectively, and shows that those lots do not extend to the island and include any part of it.*

Up to this point the Nebraska supreme court makes no finding different from that made by the district court of Buffalo county. The next finding made by the district court of Buffalo county is seemingly agreed to by the supreme court. It is: "THAT SAID ISLAND SHOULD HAVE BEEN SURVEYED BY THE GOVERNMENT SURVEYORS; THAT IT WAS A NEGLECT OF DUTY ON THEIR PART TO NOT SURVEY THE SAME; THAT THE TITLE TO SAID ISLAND STILL REMAINS IN THE UNITED STATES; THAT IT WAS NEVER THE INTENTION OF THE GOVERNMENT AT THE TIME IT GAVE ITS PATENT TO SAID LOTS 6 AND 7 TO CONVEY ANY PART OF THE ISLAND, NOR WAS IT THE INTENTION OF THE GOVERNMENT TO CONVEY IT TO THE PATENTEE OF LOT 8; THAT THE ONLY INTEREST THE DEFENDANT WHITAKER HAS IN THE SAID LAND IS THAT HE CLAIMS THE RIGHT TO ENTER THE SAME AS A HOMESTEAD, AND THAT HIS RIGHT IS ONLY WHAT POSSESSION WOULD

GIVE HIM, AND THAT HE HAS NO TITLE THERETO." The number of acres found in the island made it the duty of the Government surveyors to survey it. That *their neglect* to survey it should *confer rights* upon McBride and Kilgore that they would otherwise *not have had would seem strange*. That the neglect of an officer to perform his duty should deprive the United States Government of the possession of property which it owned, and should *transfer that possession to those who do not own it, would also seem very strange*. The finding that title of the island remains in the United States and that it was never the intention of the Government to convey the island to the patentees of lots 6, 7, and 8 is seemingly conclusive of the rights of defendants in error, unless there is some good legal reason apparent from the record why they should recover. THEY DO NOT CONTEST THE FACT THAT THE TITLE IS YET IN THE UNITED STATES. The learned commissioner of the supreme court of the State of Nebraska, who wrote the opinion, states: "Should the Government at any time hereafter desire to open this question, and to claim this island for itself, or for any grantee, no judgment which this court could enter in this case could in any manner prejudice its rights, as its title to this island could not be affected by proceedings in a case to which it is not a party" (printed Record, page 87). Later in the opinion he says: "As the question of the *rights of the State* has not been presented in this case, we reserve that question until a case arises in which we may have the benefit of the argument of counsel, it being one of too much importance to be determined without a full discussion" (printed Record, page 94). From these statements it will be seen that the learned commissioner of the Nebraska supreme court nowhere controverts the ownership of the United States Government and its right to assert title.

Before the passage of the act of July, 1876, the United States Government owned all the islands in the Platte river

within the Fort Kearney military reservation. It owned the land under the water in the channels. *If it sold one island it could only have sold to the center of the channels surrounding that island. Therefore, when it sold one island it would own the next island and to the center of the channels surrounding that island. As the United States Government never sold the island in controversy, it owns all round it to the center of the channels, does it not?*

There is no conflict whatever between the survey and the law. The survey is *no survey* so far as the island in controversy is concerned. It is a false survey as to the meander line bounding the lots owned by McBride and Kilgore, but as these meander lines simply *point to natural streams bordering on those lots, there is no conflict.* The survey and the law *both point* to the center of the channel, the *first channel next* to Kilgore's lot, as his boundary, and point to the center of the channel next to McBride's lot as his boundary, and *neither* of the meander lines *points to the island as a part of the lots in question because that would be against the rule and against the law. The island was never surveyed.* It is as much entitled to a survey as any *other island. When it is surveyed it may have meander lines.* As yet it has none because none have been established for it.

I.

Our friends upon the other side contend that as the Platte river is unnavigable that the rule of the common law is in force as to any riparian owner, and that the riparian owner owns to the center of the channel. In support of this contention they cite Grand Rapids and Indiana Railroad Co. *v.* Butler, 159 U. S., 86; the opinion of the supreme court of Michigan in the same case, 85 Mich., 246; Wiggenhorn *v.* Kountz, 23 Neb., 690; Clark *v.* Cambridge Arapahoe Ir. Co., 45 Neb., 798; Jefferies *v.* East Omaha Land Co., 134 U. S., 178; Hardin *v.* Jordan, 140 U. S., 371; John C.

Christenson, 25 L. D., 413; Dederick C. Glissman, 25 L. D., 474, and they also refer to the exhibits in this case, B and C, pages 75 and 76 of the printed record. Counsel for defendants in error quote at length from the opinion of the learned chief justice of this court in the case first cited. They also quote from the opinion of Justice Maxwell in the Nebraska case which they cite, and they copy his quotation from Ingerhan *v.* Wilkinson, 4th Pick., 373, and they close their argument by quoting points from the syllabus of the Nebraska opinion in this particular case.

We do not quarrel with the principle declared in the cases cited that the riparian owner of shore lands coming *down to the river* owns to the center or thread of the stream. We have no quarrel (for it is undoubtedly the law) except to say *that the doctrine does not apply where one islander seeks to appropriate the island next to his island.* By purchasing one island or part of an island from the Government, why should the purchaser contend that because of such purchase he has also become the owner of the *next island?* This is a question presented to the Nebraska supreme court, upon which it has maintained a most profound silence. This silence would seem to be explained only upon the ground that the author of the opinion believed that he was writing about a claim based upon "the grant of the *shore lands*" (printed Record, page 86); "that the island was one which was not to be surveyed under the instructions from the Land Department, and that it passed by a grant made by the Government of the *shore lands* lying opposite" (printed Record, page 86). The opinion speaks of the lots owned by McBride and Kilgore *as shore lands.* THE SHORE LANDS OF A RIVER ARE THOSE WHICH COME DOWN TO IT FROM THE OUTSIDE. This being so, the purchaser of part of an island has not necessarily bought a *whole island three-quarters of a mile long in the vicinity of the lot or lots which he purchased on another island.* We think that the principle

of riparian right if applied in this case *must result in leaving Whitaker in possession of the land.* If McBride and Kilgore are to be considered as *shore* owners instead of *island* owners, then each of them owns to the center of the channel *next to his lots. That being true, he has no claim of any kind on the island occupied by Whitaker.* McBride will own to the center of the channel immediately *north* of his lots, and Kilgore will own to the center of the channel immediately *south* of his lots. Whitaker will be left in possession of the island and will own the land under the water to the *center of each* of *the streams which together surround his island.*

When the writer sees a juggler toss balls or knives in the air, he is never certain of the number of balls or knives. This is probably a common experience. The idea is suggested that it may have been this sort of thing with which our friends upon the other side confused the learned supreme court commissioner who wrote the Nebraska opinion. THEY CALLED TWO THINGS BY ONE NAME. Of course, calling them by one name did not change the fact. *They were still two things.* But no one may be quite certain that he is able to successfully resist the effect of repetition. The harmless story-teller found in every neighborhood in time believes that he actually had the adventures which he relates. There are a great many channels of the Platte river. *Two of these channels surround the island in question. Each channel* is about three-quarters of a mile long. The one on the south side of the island is nearly straight, as shown by the plat. The one on the *north* side is in the shape of a bow, and is therefore a little longer. Just before leaving the southeast quarter of section 12 it forks. The *north* fork goes on the north side of *another island,* while the *south* fork joins with the stream that has run on the *south side of the island in controversy,* and in a few rods they again separate and surround Park island, which is also shown on the plat. Kilgore is invoking the doctrine of riparian rights to hold *these islands also.* Our friends have spoken and written of the channels of the river by

which the island in controversy is surrounded *as if they were one channel instead of two.* They have spoken and written of "Mosquito channel." As language is used, that *just means one, one channel.* They have never any place in the pleadings or in their briefs said anything about the MOSQUITO CHANNELS. "Mosquito channel" occurs once on the second page of their brief, three times on the fourth page, four times on the fifth page, once on the sixth, twice on the eighth, and three times on the ninth page. THEY NEVER WRITE IT IN THE PLURAL.

By looking at the map in the printed record between pages 74 and 75 the court will *see two distinct streams or channels beginning down in section 13 coming up northeast through section 12 and going over into section 7 in the next township.*

In the testimony the witness Swinyer describes TWO distinct channels (printed Record, page 57). When Swinyer was asked to describe "Mosquito channel east of the island in dispute" he says that *there are four channels there* (printed Record, page 57). The *two channels* which *go around the island* he describes as having the *same width* (printed Record, page 57). These two streams enclose and entirely surround an island which is shown by the plat to extend into *three different sections*, and they cross *the section line* and go into *another township from that in which it starts.*

As we understand the rule, the right obtained by becoming the owner of the bank can in any event only extend to the *center of the channel next to the bank*, and never results in the first instance in the extension of a line marking the boundary of a Government subdivision *until such line crosses a stream. The riparian right extends no line bounding a Government subdivision so that the same crosses either a stream or an island.* An island lying within an extension of such lines, but not touching them and not being longer than the width of the Government subdivision, may sometimes be properly included. In the case of The Indiana and Grand Rapids Railroad Co. *v.* Butler, *supra*, the island al-

leged to have been unsurveyed was at the time of the original survey a *mere speck of sand bar covered with water most of the year.* At the time of the second survey, when it was actually surveyed, it contained only 2.56 acres.

As it was only a speck of sand bar at the time of the first survey and was covered with water most of the time, it is fair to presume that because of its extreme insignificance the Government did not intend to assert title to it. When the General Government created the State of Michigan, it surrendered to the State its ownership to the bed of the river. It therefore made it possible for the State to extend the right of the riparian owner under the water to the center of the channel, even though the river was navigable. (In Michigan the riparian owner owns the land under the water to the center of the stream in a navigable river, as well as where the stream is not navigable.) If an island arose in the bed of the stream *after* the creation of the State, it would seem to belong to the riparian owner, in accordance with the rule in Michigan. It would not belong to the United States, *because not in existence when the survey was made and not in existence when the State was created.* That particular island was only a speck of sand bar at the time of survey, and it was covered with water most of the year, and because of *its diminutive size it was within the extended lines of a Government subdivision.* There was no need to cross a stream with an extension of these lines to get that little island in Michigan. But in the case at bar these TWO STREAMS ENCLOSE AN ISLAND WHICH IS SHOWN *by the plat to extend into three different sections, and it goes over a section line into another township than that in which it starts.* THIS ISLAND IS FULL THREE-QUARTERS OF A MILE LONG AND ITS PRODUCTIVENESS SUFFICIENT TO GUARANTEE THE AMPLE SUPPORT OF A LARGE FAMILY. The land is probably worth 40 to 50 dollars per acre. The Government may well be supposed to *desire to assert* its right to an island like this, which has had its existence in its present form perhaps for a century or more, when it would be quite in-

different to a speck of sand bar covered by water most of the year and which had *not yet grown* to the dignity of an island at the time of the survey. THE POLICY OF THE GOVERNMENT IS TO APPORTION ITS PUBLIC LANDS AMONG THE PEOPLE.

II.

The practical question presented by the case is, " Does the Government wish to permit the purchaser of part of an island to gobble up all the islands in the vicinity "? *McBride and Kilgore each own a part of separate and distinct islands, and by virtue of such ownership they seek to appropriate and divide between themselves another whole island, which is entirely separate and distinct from the separate islands in which they respectively own lots and which island begins above their lots and extends down below them.* If the owner of part of one island, sold to him or to his grantors by the United States, can become by such sale the owner of all of the next island, which has not been sold to him or his grantor and which the United States still owns, then it is difficult to understand why the mere audacity of such a claimant may not rise to a Napoleonic ambition and claim all the unsold islands in the vicinity. That is just what Kilgore has done. He is one of the early cattlemen in Nebraska and he has fenced up most of the islands in his vicinity and hopes to be enabled by the decision rendered in this case to permanently keep them. This is the *first island* which he asks this court to declare belongs to him and his assistant in the plan, McBride. *This is a test case and a considerable number of other prospective homesteaders and actual settlers are waiting to see the result.*

III.

On page 18 of their brief, counsel for defendants in error meet us with two propositions:

"First. This court has no jurisdiction of this case for the reason that no Federal question is involved therein.

"2. The decision of the supreme court of the State of Nebraska is in accordance with the laws of the United States upon the questions involved."

We dispute both propositions. The rights of plaintiff in error depend upon the construction of the act of Congress relating to the settlement and sale of the "Fort Kearney military reservation" (chapter 220, vol. 19, U. S. Stat. at Large, page 94), and also the homestead laws of the United States. *This court is the court of last resort whenever a United States statute is to be construed or an authority exercised under the United States is to be judicially considered.*

The contention of our adversaries would seem to be in effect that it was necessary to plead the law, and they say this was not done. *To this we say that they themselves pleaded the law and the particular act in question, and we have agreed with them, as we necessarily must, because the rights of our clients depend upon this law.* We will say, however, that, as we understand it, the court will take judicial cognizance of what the law is, and that it is never necessary to plead it in any jurisdiction in which the law is in force. *The facts are and the record shows that the plaintiff pleaded the particular act upon which the Whitakers rely.* The act of Congress of July 21, 1876, is contained in the 19th United States Statutes at Large, page 94, and the effect of that act and the rights of the parties under it have been discussed at the several sessions of the district court and numerous sessions of the State supreme court ever since the case began, and now the discussion goes on in this court.

Counsel for the defendant in error complain that "there

is no reference made to this statute in the decision, the pleadings, nor the evidence." They say: "This statute was interpolated or attempted to be interpolated in this case for the first time in the petition for the writ of error" (Brief of Defendant in Error, page 19). To this we say: (1.) *That the land was included in the Fort Kearney reservation, and would still be there but for the particular act in question. All parties were forced to consider the act of Congress which legalized settlement upon the reservation and opened it up for survey and sale. McBride and Kilgore both relied upon it, as did also Whitaker. Neither may have any right which is not acquired under it.* (a.) The first defense of the Whitakers is "that this court, the district court of Buffalo county, has no jurisdiction of the subject-matter involved in this case" (printed Record, page 7). Under this defense it was argued that the act in question *conferred no rights upon the State court to assume jurisdiction, and that to render a decision ousting the Whitakers from the island was to invade the province of the Land Department of the United States, and to oust the Federal courts of the jurisdiction conferred by law and to usurp their functions.* It was urged by the Whitakers that the island was no part of the lots belonging to McBride and Kilgore by either accretion or reliction, and that they were in possession, and that the husband, Geo. S. Whitaker, had not exhausted his homestead right and was on the land to make a homestead entry (printed Record, page 8). (*b.*) *The amended petition of McBride, in the very first paragraph, refers to this particular act.* He claims by virtue of a survey, "PARTICULARLY UNDER THE ACT OF CONGRESS RELATING TO THE SURVEY AND ENTRY OF THE FORT KEARNEY MILITARY RESERVATION" (printed Record, page 12). (c.) The finding of the district court is along this line, except that that court declares the fact according to the evidence, that no survey of the meander lines was actually made (printed Record, pages 16, 17, and 18). This does not dispute McBride's allegation concerning his ownership of lot 8, but the conclusion of the court as

to the law is contrary to McBride's conclusion of what the law is. Yet there is no dispute concerning the fact that Congress passed the act. (*d.*) Upon the trial of the case Whitaker objected to the introduction of testimony; "third, that the court has no jurisdiction of the subject-matter, it being a part of the domain of the United States and within the exclusive jurisdiction of the United States court and unsurveyed" (printed Record, page 21). In the opinion of the Nebraskan supreme court it is said by the learned Commissioner who wrote it, "the island in dispute and the *shore land* now owned by McBride and Kilgore were formerly embraced in the Fort Kearney military reservation; this was surveyed under the act of Congress of July 21, 1876, and, as heretofore stated, the surveyors were instructed by the Land Department of the General Government having that matter in charge to survey no islands found in the Platte river not containing 21 acres or more" (printed Record, page 88).

In the face of this showing, the contention of our friends that there was no reference to the act of Congress of July 21, 1876, until the petition for the writ of error must certainly fall to the ground. It was kept up right along afterwards, and there were many pages of earnest reference to it before the petition for the writ of error. We quote from the motion for the rehearing (printed Record, pages 95 and 96): "A rehearing should be granted for the reason that the opinion assumes that the defendant Whitaker may be ousted from his possession by two persons who are conceded by the opinion not to be the owners of the land in question, as the opinion does *not undertake to say that the legal title to the land is not in the United States. If the legal title to the land is in the United States, then only the United States can put Whitaker off the land.*

"A rehearing should be granted because the opinion does not determine who is the lawful owner of the land and without determining that fact provides for a judgment of ouster

against Whitaker. Now, neither McBride nor Kilgore can allege a title *superior* to the real defendant, Whitaker, against whom they conspire, and against whom they are attempting to operate as a pair of scissors. Before they could recover against Whitaker in an action of ejectment they would be compelled to prove their superior title. *If they obtained the superior title, it was from the United States, and the opinion expressly holds that they have acquired no title from the United States. It follows as a legitimate consequence that they have no title and therefore that they should not recover.*

"There should be a rehearing because under the opinion it is not determined that the *United States ever parted with its title to the land in controversy, and it is expressly determined that a controversy in the United States Land Office to obtain title to the land may still be maintained.*

"A rehearing should be granted because McBride and Kilgore have together conspired to *avoid the usual form of judicial procedure* and *have substituted an action to quiet title in place of an action of ejectment* and have deceived this court by their pretended hostility to each other, so that it has overlooked the *fact that the stipulation of McBride and Kilgore to confer jurisdiction ought not to stipulate the real defendant Whitaker out of his constitutional right to a trial under the usual forms of law and to a hearing before a jury.*

"A rehearing should be granted because the United States held the land in question *for the purpose of settlement* and Whitaker *settled on the land,* and now without determining that the United States *intended* to part with title to the land, and without determining that the United States is *unwilling* to *permit Whitaker's occupation and settlement,* the opinion ousts Whitaker from possession of the land, and *thereby defeats the purpose of the United States and the object of the law of Congress.*

"A rehearing should be granted because Whitaker as a citizen of the United States *had a right to settle upon the land,* and as a citizen of the United States he had a RIGHT TO HAVE

THE RULE PERTAINING TO THE GOVERNMENT SURVEY ENFORCED." In the supplementary motion for a rehearing it was, among other things, further alleged: "A rehearing should be granted because the statement of the learned Commissioner who delivered the opinion, that 'the fact that the plaintiff McBride and the defendant Kilgore each claim ownership of a part of the land in dispute, but cannot agree upon a division to be made thereof, does not in our opinion present any matter for the equitable interference of the court,' is a statement of the law and the action should have been dismissed by this court. The judgment of the district court dismissing the action was right.

"A rehearing should be granted because the facts found by the district court are not controverted by the learned Commissioner who delivered the opinion. The effect of his opinion is that a right may be founded upon a disregarded duty, and that such right may be taken from one who ought to be entitled to it and given to one who ought *not to be entitled to it*, and that the United States may thereby be deprived of distributing its own lands among its own citizens, *according to the laws of Congress and the merits of their respective claims*.

"A rehearing should be granted because the facts and the law are both as they were found by the trial court."

The motion for a rehearing was disposed of on the 13th day of October, 1902, and on the same date a mandate issued (printed Record, pages 98 and 99).

On the 6th day of November, 1902, counsel for Whitaker were given leave to file a motion for a rehearing and briefs in support of the same. Thereafter, on April 7, 1903, the mandate was recalled. On the 3d day of June, 1903, the second motion for a rehearing was overruled and a rehearing denied (printed Record, page 100). On the 4th day of June thereafter Whitaker moved the court as follows: "To so far modify the opinion as to declare that as between McBride and Kilgore on the one side and Whitaker on the other side

the land in controversy is not adjudged to be the property of McBride and Kilgore, and that there is no intention to declare that the title of the United States was ever divested or its ownership and control surrendered." (2) "That no mandate shall be sent to the district court of Buffalo county directing a judgment to be rendered against Whitaker which shall oust him from possession of the land pending his application to the General Land Office of the United States for leave to make a homestead entry on the same. In support of this application, appellee refers to copies of the papers filed by him in the United States land office at Lincoln, Nebraska, and states that he has applied to the General Land Office of the United States to have the land surveyed and to make a homestead entry of the same. And that he is a citizen of the United States and of the State of Nebraska and qualified to make such entry, and that he resides on said land with his wife and children, and that he has made valuable improvements thereon" (printed Record, page 101).

On the 20th day of June, 1903, the said motion was denied, and on that day there issued out of the said supreme court of Nebraska a mandate to the district court of Buffalo county (printed Record, page 102).

In the answer of the Whitakers it was, among other things, alleged: "First, that the court has no jurisdiction of the subject-matter involved in this case.

"Fourth, that said Geo. Whitaker is a citizen of the United States and of the State of Nebraska, and that he has never used his homestead right under the homestead laws of the United States.

"That he is of lawful age; that he is head of a family."

"Fifth, that this defendant, for the purpose of entering upon lands under the homestead land laws of the United States, has *entered upon and settled upon a tract of land unsurveyed and unoccupied.* * * * Eighth, that plaintiff never entered or proved upon said tract, nor has he any title right or interest by, under, or through any one to said tract; ninth,

that the said tract of land is owned by the United States Government and is subject to entry, and this defendant now lives on said tract under his right as a citizen under the homestead laws of the United States" (printed Record, pages 9 and 10).

It was further alleged that the United States Land Department could not be ousted by a State court from its administration of the law.

It was further alleged that McBride and Kilgore were *themselves trespassers, and that the United States owned the land, and that Whitaker's occupation of the land was lawful, and that no one could be heard to question his title except the United States.*

IV.

The learned commissioner of the Nebraska supreme court raises the question that the Government survey and plat are disputed by Whitaker. He discusses this question with learning and skill at considerable length. On page 88 of the printed record he says: "It is insisted that the rule in this State is firmly established, that it may be shown by evidence outside and independent of the Government plat of the survey that there was unsurveyed land left between the meander line of a grantee from the Government and the river bank to which he claims. And that if this fact is established he has no claim to the lands lying between the meander line and the bank, even though the Government plat of the survey shows the meander line to extend along the bank and the grant was made with reference thereto. The following cases are referred to as supporting this doctrine: Lammers *v.* Nissen, 4 Nebr., 245; Bissel *v.* Fletcher, 19 Nebr., 725; Bissel *v.* Fletcher, 27 Nebr., 582; Harrison *v.* Stipes, 34 Nebr., 431. We have examined these cases with great interest, and we are unable to see any analogy between the two first cited and the case at bar, nor

do we think that it was the intention of this court in the decision of these two cases to establish the rule that one claiming no title or right derived from the United States, *a naked trespasser*, could question or contradict the correctness of an approved plat of a Government survey of public lands." *Our answer to this argument is simply that the island was not surveyed, and that it is among a lot of other islands, including the islands occupied by McBride and Kilgore, and we claim that one island has no precedence over another island.*

At this point, however, we cannot refrain from calling attention to the peculiar manner with which the learned commissioner of the Nebraska supreme court closes the paragraph. He does not question the fact that the island in controversy does belong to the United States, but in substance he says, "*Even if this island does not belong to the lots and does belong to the Government, Whitaker may not tell about it. His mouth is closed. He cannot tell, because he does not own the island.* This argument could have been made against the "intrusive" settlers who settled upon the unsurveyed land in Kirwan *v.* Murphy, 23 Sup. Ct. Rep., 599. In that case the settlers went on to unsurveyed Government land which had been reported by the Government surveyors *as included in a lake.* In that case the false meander line included something more than twelve hundred acres of Government land represented to be covered by water. Whatever the cause may have been for the false meander line, the Government asserted title to its own and got it *at the end of a lawsuit which terminated in this court, but the Government was beaten all the way up until it reached this tribunal.* Settlers went upon this Government land, and by reason of representations made to the Land Department they succeeded in obtaining an order for a new survey. To restrain the making of this survey an action was brought by the appellees who owned lots coming down to what was represented to be the meander line of the lake. They sought to restrain Kirwan, the United States surveyor general for

the district of Minnesota, from making the survey. The lot-owners alleged their ownership of the lots, that the land was surveyed in June, 1876, and that the record of the survey had been approved by the United States surveyor general, and that a plat had been made and submitted to the Commissioner of the General Land Office, and that the surveying plat had been approved by the Government. It was further alleged that the survey and plat were inaccurate and did not correctly show the location and subdivisions of land and water in the township. It was claimed that the lake was actually much smaller than shown by the plat, and this was shown to be true. It was also claimed by the complainants that they purchased the land for value as extending to the lake, upon an estimate of the timber thereon, without knowledge of inaccuracy or fraud in the survey; that the consideration inducing such purchase was that the land bordered the lake, and that they owned other timbered lands, the timber from which could be brought to market by floating through the lake and its outlet through the St. Louis river, then the only means of transport; that in 1892 "certain intrusive settlers," knowing complainants' right and claim, petitioned for the survey of said lands, and that an order and contract therefor had been made and the survey was about to commence." It was said that a new survey of the lands would put the complainants to great and vexatious litigation in making proof of their title in actions against parties who were wholly irresponsible. It was also claimed that a large amount of the timber standing on the land belonging to the complainants would be destroyed in the making of the survey, and that the remainder would be exposed to damage by fire by reason of such resurvey. The prayer was that the surveyor general, his agents, attorneys, solicitors, and servants, should be restrained from entering into any contract for the survey of the lands described, or from surveying the same, or from taking any action for a survey of said lands, and that the

complainants should be protected in the use and enjoyment of such lands owned by them, extending to and including the shores "of said Cedar Island lake *and to the center of said lake.*" The appellants answered, admitting the making of the contract for the survey of the unsurveyed lands lying between the purported meander line and the actual body of the lake; "that in 1876 a contract was made with one Howe for a survey of the township and that he returned the field notes of a pretended survey from which a plat was made and approved, but averring that Howe surveyed only the exterior lines of the township, and in fact made no subdivision thereof or survey of the lands within it; that his field notes were false, fraudulent and fictitious, and the plat made therefrom was false and incorrect; admitting that the survey and plat were approved by the Commissioner of the General Land Office after complaint to him of its inaccuracy, but not until after withdrawal of the charge of inaccuracy by the person making it." A copy of the approved plat was before the court. The appellants denied that all of the lands were disposed of by the Government and alleged that about twelve hundred acres of land "were never disposed of and are still unsurveyed, lying between Cedar Island lake and the lots described;" alleged that "the land between the lake and the boundary line (Howe's meander) of the fractional lots is the twelve hundred acres of unsurveyed land referred to. The answer also denied that the timber would be destroyed or damaged in making the survey. Upon the trial the circuit court found that Henry S. Howe, a deputy surveyor of the United States, had made a contract with the Government for the survey, and that he made and filed what purported to be field notes of a survey from which a purported official plat was made and approved by the surveyor general of the United States for the district of Minnesota and by the Commissioner of the General Land Office, and that there was no evidence to indicate that there had been any actual survey

beyond the running and marking of the exterior boundary lines of the township. The lake was found to be a navigable, deep and permanent body of water having about nine hundred acres area instead of eighteen hundred acres, as described in the field notes and official plat. The conditions were found to be the same as in 1876. There was no evidence that any meander line of the lake was surveyed. The outlet of the lake was found to be at a different place from that described in the field notes and in the official plat. The evidence failed to show participation of the purchasers in any fraud or misconduct of the surveyor. The circuit court held that the lot owners owned the land to the actual waters of the lake and enjoined the survey. The court of appeals affirmed this decree. This court held in effect "that the intrusive settler was to be protected." It reversed the decree of the circuit court and the order of affirmance in the circuit court of appeals. *This court refused to be bound by the fraud of the surveyor. The district court of Buffalo county, in the first instance, directly followed the precedent set by this court. This court refused to hold that the fraud or neglect of a Government officer should deprive the United States of its property or the settlers who went on this land of their rights.* While the settlers were not before the court, THE ACTION OF THIS COURT PROTECTED THEIR RIGHTS. This court held that there was a right to survey between the *false meander line* and the *water line of the lake.* THIS IS A RECOGNITION OF THE RIGHT TO SURVEY THE ISLAND IN THIS CASE. In the case cited and in the case at bar it is the United States WHICH OWNS THE UNSURVEYED LAND. *If it was right to have a resurvey in the case cited, then it is right to have a resurvey in the case at bar.* It is the unsurveyed land of *the United States* that is to be surveyed *in both instances.*

V.

With the Nebraska supreme court the "intrusive-settler argument" was used to advantage in this case. The term used was "trespasser." In the opinion of the learned Nebraska Commissioner, the "trespasser" is denied the *opportunity to tell the truth*. If this principle should be applied to all the public lands of the United States, and had been so applied in the past, *then the whole West, and particularly the Pacific States, would be a wilderness or a desert*. In those States as in the case at bar, *settlement was invited*. If the first arrival can keep out all other settlers by fencing up the land and claiming it, then there is no such thing as distributing the public domain among actual settlers. All that our friends upon the other side claim is that they bought lots in the vicinity. That is a fact. All beyond it is sheer fabrication. Neither the *avarice* nor the *enterprise* of the *first arrival* should *permit him to deny a reasonable distribution of the bounty of the Government*.

VI.

Our friends endeavor to protect themselves behind a technical barrier. They say that we are disputing the Government plat, and they hold that up as a sacred sort of thing. To this we say that we do not dispute the plat. *We only say that the island is unsurveyed*. All parties agree that the island is unsurveyed. *If it is unsurveyed, then it is unsold* (Horne *v.* Smith, 159 U. S., 40; Kerwin *v.* Murphy, 23 Sup. Ct. Rep., 599).

The patent conveys only the land which is surveyed, and when it is clear from the plat that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it (Horne *v.* Smith, 159 U. S., 40; Lammers *v.* Nissen, 4 Nebr., 245). In the last-named case it appeared that between the meander line as run and the Missouri river

there was a tract of several hundred acres, and the court held that as that body of land *had not been surveyed* it did not pass by a patent of a lot which on the Government plat extended to the meander line. To the same effect is Glenn *v.* Jeferey, 75 Iowa, 20; Schloscer *v.* Hemphill (Iowa), 90 N. W., 842.

VII.

The United States Government does not guarantee the integrity of its officers or the validity of their acts. They are but the servants of the law, and if they depart from its requirements the Government is not bound (Moffat *v.* United States, 112 U. S., 24).

Our friends say that the courts have no jurisdiction to correct a survey (Cragin *v.* Powell, 128 U. S., 691). To this we say, that may be true, and if it is, then *they cannot by a decree give effect to a survey which never was made.* In this case the island never was surveyed, and therefore the court must not say *by a decree that it was surveyed.* If the courts are to be strictly kept within the range of judicial action alone, then they must not under the guise of judicial action declare that acts are performed *which have not been performed and which are purely political.* If the political act to be done in this case is to make a survey, and it has not been done, then it is not for the court to say that it will declare that the political act of making the survey *has been performed, although it has not been performed.* All the parties concede that the *island has not been surveyed.* This being true, it is not for the court to say that *it has been surveyed.* The testimony is that the pretended meander lines *were not run.* In the face of this testimony it is not for the court to say that *they were run.* But, in any event, the island itself is unsurveyed and there is no pretense of surveying it.

In Horne *v.* Smith, 159 U. S., 40, the meander was actually run along a bayou falsely indicated upon the field notes as

"Indian river." It was claimed that the fractional lot must be extended to the river. This is like the contention in the case at bar, *that the island which is unsurveyed belongs to lots which are separated from it by two separate and distinct streams.* In the case cited, the court held, pages 43 and 44, "In the first place the area of the lots is given, and when that area is stated to be 170 acres it is obvious that no survey was entered of over 700 acres. In the second place, the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the east half of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof in sections 22 and 27. Again, the distance from the east line of the section to the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26 and manifestly that was not intended to include land in 22 and 27."

If the same argument is to be used in the case at bar, then it would seem to be very apparent that the island is not to be considered as belonging to the lots. Taking the amount of land shown by the lots, there is surveyed in the southeast quarter of section 12, 131.09 acres. In lot 8 there are 29.70 acres, in lot 6, 34.40 acres; in lot 7, 27.90 acres; in the northwest quarter, 40 acres, making a total of 131.09 acres. This would leave in the island within the quarter section 28.90 acres to be surveyed. This is upon the theory that the quarter section, if surveyed, would contain 160 acres. Touching this same matter this court said in Niles *v.* Cedar Point Club, 175 U. S., 300: "The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for or than the Government was

offering for sale." *If this rule is to be applied, then McBride and Kilgore have no sort of legal claim to the island. The plats introduced do not call for the island.*

VIII.

We desire to call the attention of the court to the fact that the island is marked on the plat contained between pages 74 and 75 as containing "about 18 acres." This is not a part of the plat as originally made by the Government. The words and figures "about 18 acres" were marked in by Mr. C. B. Channel long after the original survey was made (Printed Record, page 64).

IX.

In Mitchell *v.* Smale, 140 U. S., 406, the court intimates the effect of a mistaken or fraudulent meander line. It says cases have happened in which by mistake the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the Government.

In French Glenn Live Stock Co. *v.* Springer, 185 U. S., 47, the court held that the making of a meander *has no certain significance.*

In St. Paul R. R. Co. *v.* Schurmier, 7 Wall., 272, the court held that the meander line is not always a boundary.

In Granger *v.* Swart, 1 Woolw., 88, Justice Miller, in his charge to the jury, among other things, said: "If between the meander line, which by the Government survey was made one of the boundaries of the land sold to Walker and the bank of Rock river and shore of Lake Koshkonong, there was at that time a body of swamp or waste land or flats on which timber and grass grew, and horses and cattle could feed, and hay be cut, then the patents to Walker did not cover this land, but were confined to the actual limit of said meander

line." We think it proper to apply this sort of rule to the island in question. The *meander line had no business to cross the channel.* At most it could only *indicate where the channel was.* There were *two meander lines,* seemingly to indicate the north channel and the south channel. At most they only pointed to the *actual channels* which they respectively were *supposed* to be made for. According to both rules, the rule applying to meander lines and the rule applying to *unsurveyed lands,* the island in question *was not sold and was not conveyed.*

In Glenn *v.* Jeffrey, 75 Iowa, 20, the field notes of the survey called for the Missouri river, but in fact only reached a bayou some distance *short* of the river. The court said: "There was no controversy as to facts. It is true that the Government plat and field notes described the meander line as being near the Missouri river and therefore it is claimed that lot 3 extended to the river. In fact, however, instead of the meander line being along the river it was run along a bayou some distance from the river." In that case the court held that the land in question could not be regarded as an accretion, because it existed *as it now does when the survey was made.* In that case the land was in fact never surveyed by the Government, and was never sold or conveyed to the plaintiff. The court further held that the lower court properly directed the jury to find for the defendant.

In Grant *v.* Hemphill, 92 Iowa, 218, the court held: "A riparian proprietor is one who owns land bounded upon a water-course or lake. The evidence in this case shows that there was not at the time of the Government survey, and is not now, any body of water east of the meander line, on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner. * * * It is well understood that a meander line is not regarded as a line of boundary. It is supposed to be along the shore of a body of water and to follow the windings of the stream or

lake and the sinuosities of the bank. In such case and where it appears that the Government intended to sell all the land to the river or body of water, the riparian owner is entitled to all the land adjacent to his grant to the water's edge (Kraut *v.* Crawford, 18 Iowa, 549). *But no such condition is found under the evidence in the case at bar. There is not and has not been any body of water upon which to locate a meander line.*"

The court then quoted the rule in the Schurmier case, that a meander line along a body of water is not a boundary, and then held: "That all of the land in dispute is part of the unsurveyed domain of the United States, to which no one can obtain title except through the regular methods adopted by the General Government for the disposition of the public lands." In support of this principle we refer to Fuller *v.* Shedd, 161 Ill., 462; Barnhart *v.* Ehrhart (Oregon, 54 Pac., 195).

We think the rule is that where there is a meander line not far from a stream that it indicates and points to the stream, but if there is no body of water there, then the meander line itself becomes a boundary. Under this rule the island in question is the property of the United States, subject to such right as the plaintiff in error, Geo. S. Whitaker, may have. *It never became the property of McBride and Kilgore.*

Horne *v.* Smith, 159 U. S., 40; 15 Sup. Ct., 988; 40 L. Ed., 68; Niles *v.* Cedar Point Club, 175 U. S., 300; 20 Sup. Ct., 124; 44 L. Ed., 171; Fuller *v.* Shedd, 161 Ill., 462; 44 N. E., 286; 33 L. R. A., 146; 52 Am. St. Rep., 380; Whitney *v.* Lumber Co., 78 Wis., 240; 47 N. W., 425; Grant *v.* Hemphill, 92 Iowa, 218; 59 N. W., 263; 60 N. W., 618; Live Stock Co. *v.* Springer, 35 O. R., 312; 58 Pac., 102.

X.

While it is true that the courts may not oust the Land Department of its jurisdiction, yet it is proper for the courts to declare the law in all cases which may properly rise touching the disposition of the public domain. Whenever there is a question as to whether title to land once the property of the United States has passed from the United States, such question must be resolved by the laws of the United States (Wilcox *v.* Jackson, 13 Pet., 498).

XI.

We do not necessarily reach this question, but where one claims that he is entitled to riparian rights he must first show that he owns the shore (Bates *v.* Illinois Central R. R. Co. (1 Black, 204); Niles *v.* Cedar Point Club, 175 U. S., 300; Lamprey *v.* State, 52 Minn., 198; Grant *v.* Hemphill, 192 Iowa, 218).

The district court of Buffalo county in its first judgment, dated June 13, 1899, finds that there was no survey of this island, because the language of the decree is: "As a matter of law the court concluded that said island should have been surveyed by the Government surveyor" (printed Record, page 17).

XII.

All parties agree that the island in controversy has not been surveyed. The solitary question, then, is whether the occupation of it by Whitaker and his wife was lawful as to McBride and Kilgore. That involves a consideration of the act providing for the settlement and survey and sale of the Fort Kearney reservation and the homestead laws of the United States and the laws of the United States pertaining to surveys. Our adversaries say that there is no Federal

question in the case. Do they mean to tell us that the State courts have exclusive jurisdiction to determine these things, and that their judgment is final? If the United States may not construe its own land laws and its own laws pertaining to surveys, and its own laws concerning the sale and disposal of its own lands, it would seem that the General Government has been eliminated from the exercise of governmental functions. The determination of these questions must be resolved by the laws of the United States (Wilcox *v.* Jackson, 13 Pet., 498).

XIII.

The United States Government ought to be allowed to determine two things. It ought to be allowed first to determine whether it will permit Whitaker to occupy this island, which is conceded to belong to it. Second, it ought to be allowed to determine whether it will accept Whitaker as a homesteader. All parties concede that the island is unsurveyed; that the United States Government may assert ownership and possession at any time. This being the case, by what right does the State court assume to take the land away from Whitaker and his wife and to give it to McBride and Kilgore? The United States, being satisfied with Whitaker for six years last past, may be presumed to be friendly to him and willing for his occupation of the island.

XIV.

How would this case be if there had never been any attempt at a survey of the Fort Kearney military reservation? Could McBride and Kilgore, who never settled upon the land, sue the United States for specific performance for a contract which was never made? For the reason (1) that this island was never surveyed, and (2) that McBride and Kilgore did not settle upon it, are they in any condition to

claim title to it? If so, upon what theory do they base their claim? The learned supreme court commissioner has written the syllabus in the case, which is supposed to cover the points decided. In the first point contained in the syllabus he uses the term "grants of land *bounded upon a river.*" Is a grant of land upon one of twenty inside channels of a river "bounded upon a river"? In the same point he speaks of the right of "proprietors of land *adjoining public rivers.*" Is the owner of land on an *inside* channel of a river the proprietor of land *adjoining a river?* In the second point he speaks of a grant of land upon a non-navigable river which "shows a meander line along the river bank." Is a meander line along an *inside* channel a meander line along a *river bank?* As we understand it, THE BANKS OF A RIVER ARE ON THE OUTSIDE OF THE RIVER. THEY ARE NEVER ON THE INSIDE. On page 86 of the printed Record the opinion speaks of "*shore lands* lying opposite." On page 88 of the printed Record the opinion speaks of "the island in dispute and the *shore lands* now owned by McBride and Kilgore." We submit that an examination of the opinion shows that its learned author did not understand that McBride and Kilgore *were themselves islanders. He supposed that they owned outside lands coming down to the shore of the river.* Apparently he did not look at either of the maps contained in the printed record. The first map, which is between pages 74 and 75, shows that lot 8, belonging to McBride, extends *up north* from the south section line of section 12 to the *south channel*, and that lots 6 and 7, belonging to Kilgore, extend *down south* from the *north line of the quarter section to the north channel.* This plat also shows that the said stream known as the north channel of Mosquito channel, begins west of the west line of section 12 about a quarter of a mile and runs in a northeasterly direction until it crosses over both the east and the west lines of the said southeast quarter of 12, and then continues northeast to where it joins the south channel of the said "Mos-

quito channel" and nearly a quarter of a mile northeast of the said southeast quarter of 12. This plat also shows that the *south channel* begins south and west of the southeast quarter of 12, and then runs north on east through the southeast quarter into the next section, being section 7, where it joins the north channel. The plat shows that the lots owned by McBride and Kilgore are *parts* of islands, and that they *are not* on the bank of the river, but *away inside*, so that McBride and Kilgore are not in any position to claim that they are *riparian or shore owners*. They are simply *island owners*. At most McBride can only own to the *center* of the *single* channel *next* to *his lot*. At most Kilgore can only own to the *center* of the *single* channel *next* to *his lots*.

XV.

The certificate of the chief justice of Nebraska concerning the Federal questions involved and determined is a carefully prepared statement, based upon the pleadings and the evidence and the contentions of the trial, the opinion in the case, and the rulings of the court in determining whether that opinion should stand and be enforced. It was only signed after most careful examination.

XVI.

The learned judge of the district court of Buffalo county who rendered the first judgment in the case, and rendered it in favor of Whitaker, was *not deceived by the calling of two channels by one name*. He finds: "That said tract of land was within the *extreme channels of the Platte river*." He also finds that the tract in controversy was "*entirely surrounded by certain channels of the Platte river*" (printed Record, page 16). He also finds that said channels "are substantially as shown by the plaintiff's plat." He also finds "that the *south line* of said lots 6 and 7 is the channel line as shown in Exhibit

"A," and that the *north line* of said lot 8 is the channel bounding it on the *north*, as shown in said Exhibit "A" (printed Record, page 17).

XVII.

This particular case is not of great magnitude; it only involves the welfare of one humble citizen. To him it means the opportunities of a home. But there is a considerable number of these islands. Many of them are occupied just as this one has been occupied. The Land Department seems to be afraid of the Nebraska supreme court, and it does not seem to understand the decision of this court in Indiana and Grand Rapids R. R. Co. *v.* Butler, *supra*. If this court shall lay down the law covering this question, and if it is favorable to the settlers, there is no question but that they will be protected by speedy action upon the part of the Land Department. There is a much greater acreage at stake in this case than in the case of Kirwan *v.* Murphy, 23 Sup. Ct. Rep., 599. We do not mean in this *one* case, but we mean included in the unsurveyed islands of the Platte river *lying within the Fort Kearney military reservation.*

In Tarpey *v.* Madsen, 178 U. S., 215, this court held that the right of one who has actually occupied public land with an intent to make a homestead or pre-emption entry cannot be defeated by the mere lack of a place in which to make a record of his intent. The law deals tenderly with one who in good faith goes upon public lands with a view of making a home thereon. In that case Justice Brewer, delivering the opinion of this court, said: "Where the accident or omission is not the fault of the party, but of the Government or some officer of the Government, such accident or omission cannot defeat the right of the individual." If we apply the doctrine laid down in this case to the case at bar, the mere failure of the Government surveyor to survey the island can deprive Whitaker of no right, and it becomes a

jurisdictional duty of this court to protect his possession. In the case cited, Justice Brewer refers with approval to Lamb *v.* Davenport, 18 Wall., 314, where a settlement antecedent to any act of Congress was sustained. He quotes Justice Miller, who says: "And though these rights or claims rested on no statute or any positive promise, the general recognition of them in the end by the Government and its disposition to protect the meritorious, actual settlers, who were the pioneers of emigration in the new Territories, gave a decided and well-understood value to these claims."

E. E. Brown and
Francis G. Hamer,
Attorneys for Plaintiff in Error.

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Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1904

No. 135.

GEORGE S. WHITAKER AND MARY I. WHITAKER,
Plaintiff in Error,

VS.

THOMAS M'BRIDE AND WILLIAM H. KILLGORE,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANTS IN ERROR

E. C. CALKINS AND
H. M. SINCLAIR,
Attorneys for Defendants in Error.

THE KEARNEY DEMOCRAT PRINTER.

M. P. KINKAID,
of Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1904

No. 135.

May it please the Court:

As the interests of each of the defendants in error in this controversy now seem to be mutual, we present a common brief in their behalf. We do this believing that what may be urged on behalf of both will be equally applicable on behalf of either.

We are advised that this case will soon be reached upon the calendar of this court. The plaintiffs in error have not furnished us with a copy of their brief, nor are we advised that they have yet prepared one. To avoid the possibility of not having time after the filing of their brief to prepare and print one on our behalf,

we have concluded to do so now, so that Your Honors may have from us a short statement of the facts with the citation of a few authorities which seem to us to solve the legal questions involved.

Statement.

The Fort Kearney military reservation was surveyed and opened for settlement in 1877, under an Act of Congress approved July 21st, 1876. Chap. 220, Vol. 19, U. S. Stat. at Large. In this survey the south-east quarter of Section 12 in Township 8 is intersected by a channel of the Platte River, known as Mosquito Channel. This channel was meandered in the survey. That part of the quarter section lying north of this channel was surveyed into one full forty acre tract and two fractional lots numbered on the Government plat as Lots 6 and 7, which are now owned by the defendant Killgore. The part lying south of this channel consists of a fractional lot and is marked Lot 8, and was a part of the homestead entry of the defendant McBride. (See Ex. A, page 75.) About midway between these lots, in or near the center of the channel, is an island of about 18 acres in extent. This island has never been surveyed. The defendants in error claim that their respective grants of the said fractional lots gave them title under the laws of the State of Nebraska to the thread of the meandered stream. This in-

cludes the island in controversy. They had been in possession of this island for many years and were in actual and peaceable possession thereof in April, 1897, when the plaintiff in error moved a house thereon, brought his family and "squatted" on the island, claiming it was Government Land, and he had a right for this reason to take possession of it and reside thereon.

He made no entry of this land at the Land Office, procured no filing thereon, neither did he obtain recognition of his claim from any source.

On June 27th, 1898, the defendant in error McBride commenced this action in the District Court of Buffalo County, Nebraska. His amended petition, on which the case was tried, is found on pages 12-14 of the printed record and is as follows:

Amended Petition.

The plaintiff complains of the defendants and for cause of action against them alleges:

First.

That plaintiff is the owner in fee simple of the following described lands situated in Buffalo county, Nebraska, to wit: Lots eight (8) in section twelve (12) township eight (8) range fifteen (15) and lot five (5) in section thirteen (13) township eight (8) range fifteen

(15) according to the survey thereof made under the orders of the surveyor general of the United States under authority of the various acts of Congress relating to the survey of public lands of the United States, and particularly under the act of Congress relative to the survey and entry of the Fort Kearney military reservation of which said lands are a part, and according to the official map of said survey duly made and filed in the office of the surveyor general.

Second.

That according to said survey said lots were bounded on the north by a certain channel or branch of the Platte river known and designated on said map and survey as Mosquito channel.

Third.

That the land in said section twelve (12) lying north of said Mosquito channel was surveyed into lots numbered six (6) and seven (7) and the northwest quarter of section twelve (12) and lot two (2) of section thirteen (13) which lots are now owned by said defendants Kilgore and that said lots are bounded on the south according to said map or survey by the north bank of said Mosquito channel.

Fourth.

That where said Mosquito channel passes through

between the plaintiff's said land and the lots so as aforesaid owned by the defendant Kilgore there was formed in said Mosquito channel a low, wet island or middle ground which in dry time and low stage of water in the Platte river separate the said Mosquito channel into two streams or channels which unite both above and below the said island or middle ground.

Fifth.

That said island or middle ground was never surveyed and that the Government of the United States who owned and surveyed said land afterwards and on or about the 28th day of March, 1885, granted the said lot eight (8) in section twelve (12) and lot five (5) in section thirteen (13) to this plaintiff without any reservation, and the plaintiff alleges that by virtue of said grant he took to the center of the thread of the stream of said Mosquito channel. That said lots six and seven in section twelve (12) and lot two in section thirteen (13) were afterwards granted by the United States to the said Kilgore without any reservation of said island or middle ground, so that the bed of said Mosquito channel and the island therein and middle ground thereof are owned by the plaintiff and defendant Kilgore, but that the boundary line between them has never been marked or ascertained. That the meander line as shown by the field notes and map of said Gov-

ernment survey do not coincide with the banks of said Mosquito channel as they now exist, and that there exists a controversy between the plaintiff and defendant Kilgore as to where said boundary line should be located.

Sixth.

That owing to the daming of the channels further up the stream and the general subsidence and recession of the waters of the Platte river said island and middle ground which was at the time of said survey covered with water at high stages has become much dryer and more valuable for pasture and susceptible for use for agricultural purposes and that on or about the first day of April, 1897, the defendants Whitaker moved upon said island or middle ground and have erected a house thereon and claim the same as their own, but that in truth and in fact the said Whitakers have no right, title or claim of any kind to said land and are mere trespassers, but whether they are upon this plaintiff's land or the land of the Kilgore or both this plaintiff is, on account of the uncertainty of the location of said boundary line, unable to say, but that said island or middle ground is owned by this plaintiff or said Kilgore and has been in the possession of this plaintiff and said Kilgore for more than ten years before the said entry of the said Whitakers.

Wherefore plaintiff prays that the title to the lands herein described be forever quieted; that the boundary line between the plaintiff and said defendant Kilgore be ascertained and declared and that a writ of ouster be granted plaintiff for the possession of said premises.

W. D. OLDHAM,
Attorney for Plaintiff.

The amended answer and cross petition of the defendant in error Kilgore is found on pages 14–15 of printed record and is as follows:

In the District Court of Buffalo County, Nebraska.

THOMAS McBRIDE, Plaintiff,

vs.

GEORGE S. WHITAKER, MARY I. WHITAKER, WILLIAM H. Kilgore, and Sophia Kilgore, Defendants.

Amended Answer.

And now comes the above named defendants, William H. Kilgore and Sophia A. Kilgore his wife, and for answer to the plaintiff's amended petition allege:

First.

That at all the time mentioned the defendant William H. Kilgore was the owner in fee simple and in the possession of the following described lands: the tenements situate in the county of Buffalo and State of

Nebraska, described as follows: Lots six and seven in section twelve (12) and lot two in section thirteen (13) township eight (8) north of range fifteen (15) west according to the Government survey.

Second.

That said lots lie on the north bank of Mosquito channel, one of the channels of the Platte river, and south of said lots and channel of the Platte river there is situated certain middle grounds or island which was left unsurveyed at the time of the Government survey of the adjacent lands.

Third.

That while said island or middle grounds remained unsurveyed the United States granted to Abraham Rayburn said lots numbered six (6) and in the same manner and while same — said land was unsurveyed the United States granted unto William Walker the said lot numbered seven (7) in section twelve (12) lot numbered two (2) in section thirteen (13).

Fourth.

That the grants so as aforesaid made to said Rayburn and said Walker were made with reference to said Government survey which bounded said lots from the north bank of said Mosquito channel. That the meander line of said survey along the north bank is as

indicated by the field notes and map thereof do not coincide with the actual lines of said north bank as it now exists, but cross said bank and include in the boundaries of said lot a large part of said island or middle ground and that the said grantee took by virtue thereof to the centre of said Mosquito channel, but that on account of discrepancy of said original survey the said line remains doubtful and uncertain.

That the lots so conveyed to the said Rayburn was by him conveyed to the defendant William H. Kilgore by deed dated on the 14th day of September, 1889, and that the lots so as aforesaid granted to the said William Walker conveyed to the defendant William H. Kilgore by deed duly executed and dated the 26th day of October, 1889.

Sixth.

That the defendant William H. Kilgore by himself and his said grantors has been in possession of said lots including island or middle ground to the centre of said Mosquito channel ever since the entry of said lots by said Rayburn and Walker.

Wherefore these defendants pray that the said defendant William H. Kilgore may be adjudged to be the owner of said island or middle ground to the centre or thread of said Mosquito channel and that the same may

be the judgment of this court be determined and fixed, and that these defendants may have such other and further relief as they may be entitled to.

E. C. & H. V. CALKINS,

Attorneys for Defendants Kilgore.

The answer of the plaintiff in error is found on pages 9-10 of the printed record and is as follows:

"In the District Court of Buffalo County, Nebraska.

THOMAS McBRIDE, Plaintiff,

vs.

GEORGE WHITAKER, His Wife, ET AL., Defendants.

Answer of Defendants, George and Mary I. Whitaker.

Comes now the defendants George and Mary I. Whitaker his wife and for their answer herein alleges as follows, to wit:

First.

That the court has no jurisdiction of the subject matter involved in this case.

Second.

That the allegations of plaintiff's petition does not state facts sufficient to constitute a case in equity.

Third.

The plaintiff has an adequate remedy at law.

Fourth.

That said George Whitaker is a citizen of the United States and of the State of Nebraska That he has never used his homestead rights under the homestead laws of the United States. That he is of lawful age, a head of a family.

Fifth.

That this defendant for the purpose of entering upon lands under the homestead laws of the United States, has entered upon and settled upon a tract of land unsurveyed and unoccupied located in section 12 (12) town eight (8) range fifteen (15), Buffalo county, Nebraska. That said tract has never been entered upon or settled upon or proved upon by any one, and contains twenty-seven and one half acres in said section twelve (12).

Sixth.

That said tract of unsurveyed land is not within the meander line on the north side of said lot eight (8) in section twelve (12) and not within the meander line on the north side of said lot five (5) in section thirteen (13) but lies north of said meander line.

Seventh.

That plaintiff has no title, right or interest in tract of land.

Eighth.

That plaintiff never entered or proved upon *on* said said tract, nor has has he any title, right or interest by, under or through any one to said tract.

Ninth.

That the said tract of land is owned by the United States Government, is subject to entry, and this defendant now lives on said tract under his right as a citizen under the homestead laws of the United States.

Tenth.

That these defendants deny each and every allegation contained in plaintiff's petition, not herein specifically admitted.

Wherefore these defendants pray that they may go hence without day and recover their costs and that the court decree said lands to be Government lands subject to entry and that the plaintiff be decreed to have no right, title or interest in said lands, and that defendant, George Whitaker, be in lawful possession thereof.

GEORGE AND MARY I. WHITAKER,
By FRED A. NYE, *Their Attorney.*

The findings and decree of the trial court is found on pages 16-18 of the printed record and is as follows:

THOMAS MCBRIDE, Plaintiff,

vs.

GEO. S. WHITAKER, —— WHITAKER, His Wife; WILLIAM H. Kilgore and —— Kilgore, His Wife, Defendants.

Judgment.

Now on this 13th day of June, 1899, this cause came on for hearing and trial before the court the parties hereto appearing by their respective attorneys, this cause is submitted to the court upon the pleadings, the evidence offered and introduced therewith, and the argument of counsel, and the court having considered the same being advised in the premises, finds:

That the plaintiff McBride at the time of the bringing of this suit was the owner of lot eight (8) in section twelve (12) township eight (8) range fifteen (15) in Buffalo county, Nebraska. That he made the original entry therefor and obtained title to the same by the United States patent, and has been in the open and notorious possession of the same for fifteen or twenty years.

The court further finds that the defendant W. H. Kilgore at the beginning of this suit and for a long time prior thereto was the owner of lots 6 and 7 in said section; that he became the owner of the same by virtue of a deed to him from the original patentee of said

tract, and that he has been in possession of the same for more than ten years prior to the bringing of this suit.

That said tract of land, with other land, was within the extreme channels of the Platte river; and that lying between lots six and seven on the north and lot 8 on the south, was a tract of land in said section 12, of about 22 acres entirely surrounded by certain channels of the Platte river, and which is the tract of land in dispute herein.

That the Government surveyor when originally surveying said lots 6 and 7 did not actually survey the meander line forming the south line of lots six and seven as they were required to do; but that instead of making an actual survey of said meander line along the said channel bordering on said lots 6 and 7, they falsely show upon the map made by them that they had done so, and located upon said plat what they supposed to be the true meander line of said lots 6 and 7. That they never made an actual survey of the north meander line of said lot 8 but indicated upon the plat made by them what they supposed to be the meander line of said lot 8. That they never actually surveyed the meander lines of said tract of land lying between lots 6 and 7 on the one side and lot 8 on the other and which tract is spoken of in the evidence as an island but that

they indicated upon the plat the general outlines of said island as they understood it to be.

The court further finds that said channels bordering said tract in dispute, the one being on the south of lots 6 and 7, and the other on the north of lot 8, are substantially the same now as they were at the time the original survey was made, and that said channels are substantially as shown by the plaintiff's plat marked Plaintiff's Exhibit "A" offered in evidence.

The court further finds that the defendant Kilgore at all times since he became the owner of said lots 6 and 7 claimed to be the owner of the tract in dispute as part of his lots 6 and 7: that such claim had not extended over the period of ten years at the bringing of this suit; that he had possession during a part of the time of all said tract and all the time a part of said tract.

That McBride ever since he obtained his final receipt to lot 8 has claimed to be the owner of a part of said island: that they together have had the title to lot 6 and 7 on the one side and lot 8 on the other and have had possession of the island for more than ten years prior to the bringing of this suit, but that they were contending between themselves during said period as to what part of said island each should have and did not agree.

The court further finds that the south line of said lots 6 and 7 is the channel line as shown in Exhibit "A," and that the north line of said lot 8 is the channel bounding it on the north, as shown in Exhibit "A."

As a matter of law the court concludes that said island should have been surveyed by the Government surveyor; that it was a neglect of duty on their part to not survey the same. That the title to said island still remains in the United States. That it was never the intention of the Government at the time it gave its patents to said lots 6 and 7 to convey any part of the island, nor was it the intention of the Government to convey it to the patentee of lot 8; that the only interest the defendant Whitaker has in the said land is that he claims the right to enter the same as a homestead and that his right is only what possession would give him, and that he has no title thereto.

The court further concludes as a matter of law that the Government is not bound by the failure of the surveyor hired to do this work by his neglect to perform his duty, and that his failure to actually survey said island did not thereby give the parties to whom the Government granted the land on either side thereof any right to it. To which findings the plaintiff and defendant Kilgore each except.

It is therefore considered adjudged and decreed by the court that as to the plaintiff herein and defendant W. H. Kilgore the above entitled action be and the same is hereby dismissed, and that the costs of this action to wit: $79.95 be taxed equally to said plaintiff and defendant W. H. Kilgore. To which the plaintiff and defendant Kilgore each duly except and are allowed forty days from the rising of the court in which to prepare and present to opposing counsel their bill of exceptions.

Both McBride and Killgore appealed from this decree to the Supreme Court of the state of Nebraska. Upon consideration of the appeal the Supreme Court of the state of Nebraska reversed the decree of the district court and directed it to enter a decree quieting the title to the north half of the island in Kilgore and the south half thereof in McBride. The opinion of the Supreme Court of the state of Nebraska in the matter is found on pages 82–94 of the printed record in this case.

Thereafter on June 22nd, 1903, the district court entered the decree as directed. This decree is found on pages 113–114 of the printed record. Upon this decree the Whitakers prosecute error to this court.

Argument.

The two propositions that we respectfully submit

to Your Honors are:

1. This court has no jurisdiction of this case for the reason that no Federal question is involved therein.

2. The decision of the Supreme Court of the state of Nebraska is in accordance with the laws of the United States upon the questions involved.

We will briefly discuss each in the order formulated.

I.

As to the first proposition.

In Sevier vs Haskell, 81 U. S. 12, (14 Wall) the court said: "Where the judgment of a state court is brought into this court for review, to warrant the exercise of the jurisdiction invoked, the case must fall within one of the three categories:

1. There must have been drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision of the state court must have been against the validity of the claim which either is relied upon to maintain.

2. Or there must have been drawn in question a statute of, or an authority exercised under, a state, on the ground of their being repugnant to the Constitution, a law or treaty of the United States and the de-

cision must have been in favor of the validity of the state law or authority in question.

3. Or a right must have been claimed under the Constitution or a treaty or a law of, or by virtue of a commission held or authority exercised under the United States; and the decision must have been against the right so claimed."

It is clear that the provisions of the two last cannot be invoked as a basis of jurisdiction because no question within their purview is presented.

We then turn to the first. This includes but three causes: 1, a treaty, 2, a law, and 3, an authority exercised under the United States. There is no question arising out of a treaty presented, nor is there anything concerning an authority exercised under the United States. So then the jurisdiction must stand, if at all, on a statute. What statute was drawn in question "that the state court decided against the validity of the claim" made thereunder? Was it the "Act to provide for the sale of the Fort Kearney military reservation in the state of Nebraska?" Chap. 220, Vol. 19, U. S. Stat. at Large.

There is no reference made to this statute in the decision, the pleadings nor the evidence. This statute was interpolated or attempted to be interpolated in

this case for the first time in the petition for the writ of error.

In Spies vs Illinois, 123 U. S. 131, it was said: "To give us jurisdiction under section 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time and in the proper way. To be reviewable here the decision must be against the right so set up and claimed. * * * If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned."

Brooks vs. Missouri, 124 U. S. 394;

French vs. Hopkins, 124 U. S. 524.

In California National Bank vs. Thomas, 171 U. S., 441, it was held that: "A writ of error to a State court will be dismissed when no Federal right was specially set us or claimed until after judgment in the highest court of the State."

Bobb vs. Jamison, 155 U. S. 416;

Winona & St. Paul Land Co. vs. Minnesota, 159 U. S. 540;

Scudder vs. Carter, 175 U. S. 32.

To render a Federal question availing on writ of error to a State court, it must have been raised in the case before judgment and cannot be raised for the first time on a motion or petition for rehearing.

Turner vs. Richardson, 180 U. S. 87;

Pim vs. St. Louis, 165 U. S. 273;

Miller vs. Cornwall R. Co, 168 U. S. 131.

Nor can it be raised for the first time after final decision in the highest court of the State in any manner for the purpose of supporting a writ of error from the Supreme Court of the United States.

Yazoo & M. V. R. Co. vs. Adams, 180 U. S. 1.

The certificate of the Chief Justice of the State court that there is a Federal question does not make one. It is at most presumptive and not conclusive.

In Felix vs Scharnweber, 125 U. S. 54, this court said: "When counsel applying for the allowance of a writ of error insists that federal question has been decided against the plaintiff in error, the Chief Justice of the state court may feel bound to allow the writ for the purpose of submitting to the final determination of this

court whether such a question was necessarily involved in the judgment sought to be reviewed. But his certificate that such a question arose and was decided against the plaintiff in error cannot supply the want of all evidence to that effect in the record. As has been more than once observed by this court 'the office of the certificate as it respects the federal question, is to make more certain and specific what is too general and indefinite in the record but is incompetent to originate the question.' "

Parmelee vs Lawrence, 78 U. S, 36;

Brown vs Atwell, 92 U. S, 327;

Adams County vs Burlington & M. R. R Co, 112 U. S, 123.

And again.

A definite issue as to the validity of a right under a Federal Statute must be distinctly deducible from the record before a state court can be held to have disposed of a Federal question by its decision in respect thereto.

Louisville & N. R. Co. vs Louisville, 166 U. S, 709;

Ansbro vs United States, 159 U. S, 695;

Oxley Stone Co. vs. Butler Co, 166 U. S, 648.

Furthermore.

A right must exist before it can be put in jeopardy. And a person must be possessed of a right before he can invoke the action of a court to protect it. Now, then, what right exists in the plaintiff in error that by the proceeding in this case puts that right in jeopardy? The sole allegation is that he is qualified to enter public lands of the United States under the homestead laws thereof.

This right is not denied nor disputed in this action. What is denied and disputed is that he cannot exercise this inchoate right upon the subject in question because (1) It is not surveyed and listed in the land office for entry. (2) It is not subject to entry until surveyed and listed in the local land office for entry, and (3) Title thereto has passed by the grants of lots 6 and 7 and lots 8 to the respective grantees thereof.

This last might present a Federal question if the plaintiff in error was in a condition to dispute it.

But we take it to be elemental that no one can be heard to question the title of another until he has some right or color of title to the premises in himself. This right must be more than inchoate. It must be a present exisiting right and must be connected in some way with the original source of title.

Aiken vs Ferry, 6 Sawy. 79;

Cucamonga Fruit Land Co. vs Moir, 83 Cal. 101;

Christy vs Scott, 14 How, 282.

In this last case this court said: "But a mere intruder cannot enter on a person actually seized and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title and not on the weakness of the defendant's is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land this is strong enough to enable him to recover it from a mere trespasser, who entered without any title."

The court cites the following authorities in support of the text:

Jackson vs Boston & Worcester R. R. 1 Cush. 577;

Allen vs Rivington. 2 Sand. 111;

Doe vs Read. 8 East. 356;

Doe vs Dyball. 1 Moody & M. 346;

Calleries vs Cowper. 4 Taunt. 548;

Graham vs Peat. 1 East. 246.

We cite in addition:

Sabariego vs Maverick. 124 U. S. 261;

Hubbard vs Little, 9 Cush, 475;

Pettengill vs Boynton, 139 Mass, 244;

Swift vs Agnes, 33 Wis, 240.

In Hubbard vs Little, *supra*, the court said: "Upon the facts stated in the report it seems to us, that this case falls very clearly within the familiar principle of law that the possession of land is sufficient evidence of seizen to entitle the possessor to hold it, against all persons who cannot show an earlier possession or higher or better evidence of title. * * * It follows that a prior naked possession is a sufficient title against all persons claiming only by possession subsequently acquired, because both titles being in their origin of equal validity, that which is prior in point of time must prevail."

The initial step to acquire rights under the homestead law is the entry of the land at the local land office.

Maddox vs Burnham, 156 U. S, 544;

Rourke vs McNally, 98 Cal, 291.

No rights can be founded upon a mere forcible intrusion on lands already occupied by another.

Atherton vs Fowler, 96 U. S, 513;

Trenouth vs City and County of San Francisco, 100 U. S. 251;

Rourke vs McNally, 99 Cal. 291.

The case at bar may be correctly summarized as follows:

The defendants in error were in peaceable possession of this island. The plaintiff in error, without entry, intrudes thereon. He acquired no rights by the intrusion. Having acquired no rights he has none to protect and he cannot invoke the jurisdiction of this court to protect that which he does not possess.

II.

The decision of the Supreme Court of the state of Nebraska is in accordance with the laws of the United States upon the questions involved.

The questions involved are:

1. Can a survey by the Government of its lands be questioned in a collateral proceeding?

2 Does an unrestricted grant of lands bounded upon a non-navigable stream carry with it title to the center of the stream?

As to the first question. We affirm.

First.

The survey by the United States of its lands when made and approved by it, cannot be questioned in a collateral proceeding.

Second.

That the record of such survey as returned and approved cannot be set aside, changed or modified in any manner, other than by a direct proceeding instituted by the United States only, and for this purpose.

Third.

The record of the survey as returned and approved —until set aside, changed or modified by the United States in the manner aforesaid— imports absolute verity, and is conclusive and binding on every one, including the United States.

As these proposition embody the same principle, they will, for the purpose of brevity, be discussed together.

In West vs Cochran, 58 U. S. 403, the court said:

"It has often been held by this court that the judicial tribunals, in the ordinary tribunals of justice, had no jurisdiction or power to deal with these incipient claims, either as to fixing boundaries by survey, or for

any other purpose; but that claimants were compelled to rely upon Congress, on which power was conferred by the Constitution to dispose of and make all needful rules and regulations respecting the territory of the United States. Among these needful regulations was that of providing that these unlocated claims should be surveyed by lawful authority: a cansideration that has occupied a prominent place in the legislation of Congress from an early day."

Considering the same subject in Knight vs United Land Asso., 142 U. S, 161, the court said:

"It is a well-settled rule of law that the power to make and correct surveys of the public lands, belongs exclusive to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding."

In Cragin vs Powell, 128 U. S, 691, Mr. Justice Lamar, who rendered the opinion, said:

"That the power to make and correct surveys of the public lands belongs to the political department of the government, and that, whilst the lands are subjected to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their

exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient." To which he cites.

Steel vs St. Louis Smelting Co., 106 U. S; 447;

U. S. vs San Jacinto Tin Co. 10 Sawy. 543;

Affirmed in 124 U. S. 273;

U. S. vs Flint, 4 Sawy. 61;

Affirmed in U. S. vs Throckmorton, 98 U. S. 61;

Henshaw vs Bissell, 85 U. S. 255;

Stanford vs Taylor, 59 U. S. 409;

Haydel vs Dufresne, 58 U. S. 23;

West vs Cochran, 58 U. S. 403;

Jackson vs Clark, 1 Pet. 628;

Neswanger vs Saunders, 1 Wall. 424;

Suder vs Sickles, 98 U. S. 203;

Frasher vs O'Conner, 115 U. S. 102;

Gozzam vs Phillips, 20 How. 372;

Pollard vs Dwight, 4 Cranch. 421;

Taylor vs Brown, 5 Cranch, 234;

McIneer vs Walker, 9 Cranch, 177:

Craig vs Rodford, 3 Wheat, 594;

Elliecott vs Pearl, 10 Pet, 412.

The reason of this rule is stated in Haydel vs Dufresne, 17 How, 23, "that great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do."

In Russell vs Maxwell Land Grant Company, 158 U. S, 253, the court by Mr. Justice Brewer said:

"A survey made by the proper officers of the United States and confirmed by the land department, is not open to the challenge by any collateral attack in the courts."

In this case the defendants offered to prove on the trial that the survey upon which the plaintiff's patent was based was inaccurate, and that a correct survey would run the lines of the Maxwell Grant so as to exclude the tract in controversy from the boundaries of the Maxwell Grant.

This testimony was rejected by the trial court, and this is the error complained of. This court sustained the rulings of the trial court and held that this evidence was rightfully excluded.

The action of Congress in opening this reservation is found in Vol. 19, page 94, of the United States Statutes at Large being "An act to provide for the sale of the Fort Kearney Military Reservation in the state of Nebraska, which was approved July 21st, 1876, and that portion which might shed some light on this controversy is as follows:

"That it shall be the duty of the Secretary of the Interior to cause said tract of land to be surveyed, sectionized and subdivided as other public lands, and after said survey to offer said lands to actual settlers only at minimum prices under and in accordance with the provisions of the homestead law."

This shows that the survey and the disposition of these lands follows the general law.

In Stoneroad vs Stoneroad, 158 U. S. 240 the court said:

"The practice of the United States in dealing with the public domain and all governmental grants of lands is to survey and issue patent. For this purpose, in the proper administrative branch of the government,

accurate and efficient machinery, accompanied with full remedial process for the correction of error, is provided."

The Statutes of the United States make it the duty of the surveyor to note all water courses over which the line he runs may pass, "and also the quality of the lands." (Sec. 2395, R. S.) "He shall also cause a fair plat to be made of the townships and fractional parts of townships contained in the land, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; and a copy thereof shall be kept open at the surveyor-general's office for public information, and other copies shall be sent to the places of sale, and to the General Land Office."

The survey by these means become an official record, and is subject to the same rules as other official records.

The holding of the Supreme Court of the state of Nebraska on this subject in this case (65 Neb, 137, 3rd syllabus) is: "The power to make and correct surveys of the public lands belongs exclusively to the political department of the general government, and a plat of a survey made and approved by that department cannot be impeached in the courts, except upon a direct proceeding for that purpose."

This is in accord with the holdings of this court.

The second question, "Does an unrestricted grant of lands bounded upon a non-navigable stream carry with it title to the center of the stream?"

There are no restrictions in the grants of the United States to the lands of defendants in error. The recitals are "according to the official plat of the survey, returned to the General Land Office by the Surveyor General."

See patent to McBride, page 77 of printed record.

In Hardin vs Jordan, 140 U. S. 371, the court said:

"The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor-general, thereby adopting the plat as a part of the instrument."

"Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake in front of the lands actually described in the grant. This question must be decided by some rule of law. "* * * It has been the practice of the government from its origin in disposing of the public lands to measure the price to be paid for them by the quantity

of upland granted. No charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for and not for the purpose of limiting the title of the grantee to such meandering lines."

See also Packer vs Bird, 137 U. S, 661;

St. Louis vs Rutz, 138 U. S, 226.

In Mitchell vs Smale, 140 U. S, 406, the court said:

"A meander line along a stream or other body of water is not a boundary, but the body of water whose margin is meandered is the true boundary."

St. P. & P. R. R. Co. vs Schurmeier, 7 Wall, 272;

Jefferies vs East Omaha Land Co, 134 U. S, 178;

Hardin vs Jordan, 140 U. S, 371.

In the opinion further on the court says relative to the interference by the United States:

"We think it a great hardship and one not to be endured, for the government officers to make new surveys and grants of the bed of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than tak-

ing from the first grantee a most valuable and often *the* most valuable portion of the grant."

The case of Grand Rapids & Indiana Railroad Co. vs Butler is a case that arose in Michigan, and was tried in the state courts of Michigan, being reported in 85 Mich, 246, and taken to the Supreme Court of the United States. Reported in 159 U. S, 86.

There was an island in Grand River which was left unsurveyed at the time the main land was surveyed. The lots bordering this stream were granted by patent to settlers by the United States. Afterwards the Railroad Company obtained a patent from the United States for the Island. This suit was a contest for this island. Butler claimed it by virtue of his riparian ownership. The railroad company by virtue of its patent. Butler prevailed in the Michigan courts, which judgment was affirmed by the Supreme Court of the United States.

Grant J. of the Michigan court, after stating the facts, said:

"Under these facts the principal question in controversy is, did the original grant carry with it the title to the middle thread of the stream, or was it limited to the east meander line thereof. It is the well recognized rule in this state that a grantee of the land bounded in the deed of conveyance by a stream, takes

title to the land under the water to the center or middle thread of the stream, in the absence of an express reservation. This rule applies to grants by the United States, as well as to individuals. The legal maxim must here be borne in mind, that all grants must be construed most strongly against the grantor. To this maxim the government forms no exception. Reservations cannot be implied, when, therefore, the government has surveyed its lands along the bank of a river and has sold and conveyed such land by government sub-divisions, its patent conveys the title to all islands lying between the meander line and the middle thread of the river, unless previous to such patent, it has surveyed such islands as governmental sub-divisions, or expressly reserves them when not surveyed."

Mr. Chief Justice Fuller who delivered the opinion of this Court in that case, after disposing of some minor matters, said:

"The inquiry is reduced then to this: Did the court err in holding as matters of law upon this record, that the grant vested in Lyon and Hastings the title to the particular land in controversy?" (Lyon and Hastings entered this land and received patents from the United States and were the parties from whom Butler derived his title.)

"In Hardin vs. Jordon, 140 U. S., 371, it was held that grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed as to their effect, according to the law of the state in which the land lies, and the following from the opinion of Scates, J., in Middleton vs. Prichard, 4 Ill., 510; 38 Am. Dec. 112, was quoted with approval: "Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. At common law this depends upon the character of the stream or water. If it were a navigable stream of water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the center thread of the current. At common law, only arms of the sea and streams where the tide ebbs and flows, are deemed navigable. Streams above tide water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. To these, riparian proprietors bounded on or by the river, could acquire exclusive ownership of the soil, water and fishery, to the middle thread of the current; subject, however, to the public easement of navigation. And this latter, Chancellor Kent

says, bears a perfect resemblance to public highways. The consequence of this doctrine is, that all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main land and the center thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right."

"The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government, where the land may lie. We have adopted the common law, and must, therefore, apply its principles to the interpretation of their grant."

In the state of Nebraska the common law is in force as to the rights of the riparian proprietor.

In Wiggenhorn vs Kountz, 23 Neb, 690, the court speaking by Justice Maxwell said:

"There is no doubt of the rule that grants of land, bounded upon a river not navigable, carry with them

the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, the rule of the common law being that proprietors of land adjoining public rivers not affected by the flow of the tide own the soil *ad filum aquae.*"

Clark vs Cambridge & Arapahoe Ir. Co, 45 Neb, 798;

Jefferies vs East Omaha Land Co, 134 U. S, 178.

The land department of the United States, recognizing the rule as applied in Butler vs Railroad Co, 159 U. S, 86 *supra*, and Hardin vs Jordon, 140 U. S, 371 *supra*, have refused to survey any and all islands in the Platte River, and this refusal is based on the ground that they belong to the riparian proprietor. See application of

John C Christensen, 25 L. D, 413;

Dederick C. Glisman, 25 L. D, 474.

See also Exhibits B and C, pages 75-76 of printed record.

The Supreme Court of Nebraska in Wiggenhorn vs Kountz, 23 Neb. on page 695 quotes from Ingraham vs Wilkinson, 4 Pick. 373, which illustrates the respective rights of defendants in error. "The doctrine of alluvion and its consequences seem to be very clearly set-

tled. That which is formed by gradual accretion belongs to the owner of the soil to which it adheres. The land which may be separated from a man's farm by a sudden change of the bed of the river, may be reclaimed by him who lost it. Islands formed in the river, if altogether on one side of the dividing line, the *filum aquae*, belongs to him who owns the bank on that side; if formed in the middle of the river they are appropriated to the owners on each side, not in common, but in severally, according to their original dividing line, the *filum aquae*, as it is where the waters begin to divide. Such is the civil law, and the justice of this appropriation cannot be questioned. If the *filum aquae* divide itself, and one part take the east and the other the west, and leave an island in the middle between both *fila*, the one-half will belong to the one lord and the other to the other."

The Supreme Court of Nebraska on this subject in this case (65 Neb. 137, syllibi 1 and 2) said: "Grants of land bounded upon a river not navigable carry with them the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the bank or margin of the river; the rule of the common law being that proprietors of land adjoining public rivers not affected by the flow of the tide, own the soil *ad filum aquae*."

"A grant of land bounded upon a non-navigable river, made by the general government with reference to the plat of the survey which shows a meander line along the river bank, conveys to the grantee title to such unsurveyed islands or parts of islands as lie within that limit."

See also opinion in printed record, pages 82–94.

This holding is within the rule laid down by this court in Hardin vs Jordan and Grand Rapids & Indiana Railroad Co. vs Butler *supra*.

All of which is respectfully submitted.

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Supreme Court of the United States.

No. 135.—October Term, 1904.

George S. Whitaker and Mary I. Whitaker, Plaintiffs in Error, *vs.* Thomas McBride and William H. Killgore. } In error to the Supreme Court of the State of Nebraska.

[April 10, 1905.]

This was an action commenced on June 27, 1898, in the District Court of Buffalo County, Nebraska, and terminated by a decision of the Supreme Court of the State. 65 Neb. 137. The facts found by the District Court are that McBride and Killgore were respectively the owners and in possession of tracts of land bordering on the Platte River, one on the north and the other on the south side thereof. Between these two tracts and in the main channel of the Platte River is an island, containing about twenty-two acres. This island had been in the possession of McBride and Killgore for more than ten years prior to the bringing of the action, but during that time they were contending as to how much of the land each was entitled to. It had never been surveyed by the Government.

It appeared in evidence that Whitaker, in 1897, settled on the island, claiming the right to enter the same as a homestead; that application to the Land Department of the Government to have the island surveyed was in 1897 refused, the Department declining to take any action in the matter. These lands were a part of the Fort Kearney Military Reservation, which was surveyed and sold under a special act of Congress, dated July 21, 1876, (19 Stat. 94;) the patent to McBride, who had entered his tract as a homestead, bearing date March 28, 1885. There was testimony tending to show that the island was at the time of the survey of the reservation frequently covered with water, and that since then—perhaps owing to the construction of bridges and dykes—overflows had been less frequent and the land better adapted to occupation and cultivation. The decree directed by the Supreme Court was adverse to Whitaker, and quieted the title to McBride and Killgore to the island, giving to each one-half.

Mr. Justice Brewer delivered the opinion of the Court.

The decision of the Supreme Court of the State was that the owner of lands bordering on a river owns to the center of the channel, and takes

title to any small bodies of land on his side of the channel that have not been surveyed or sold by the Government. It is the settled rule that the question of the title of a riparian owner is one of local law. In *Hardin* v. *Jordan*, 140 U. S. 371, the matter was discussed at some length, the authorities cited, and the conclusion thus stated by Mr. Justice Bradley, delivering the opinion of the court (p. 384):

"In our judgment the grants of the Government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

See also *Shively* v. *Bowlby*, 152 U. S. 45; *Lowndes* v. *Huntington*, 153 U. S. 19; *Grand Rapids &c. Railroad Company* v. *Butler*, 159 U. S. 87, 92; *St. Anthony Falls Power Company* v. *Water Commissioners*, 168 U. S. 349; *Kean* v. *Calumet Canal Co.*, 190 U. S. 452; *Hardin* v. *Shedd*, Id. 508.

If there were no island in this case it would not, under these authorities, be questioned that the title of the riparian owners extended to the center of the channel. How far does the fact that there is this unsurveyed island in the river abridge the scope of the rule? In seeking an answer to this question these facts must be borne in mind: The official surveys made by the Government are not open to collateral attack in an action at law between private parties. *Stoneroad* v. *Stoneroad*, 158 U. S. 240; *Russell* v. *Maxwell Land Grant Company*, 158 U. S. 253; *Horne* v. *Smith*, 159 U. S. 40. A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. *Railroad Company* v. *Schurmeir*, 7 Wall. 272; *Hardin* v. *Jordan*, *supra*; *Horne* v. *Smith*, *supra*. The Fort Kearney reservation was a single body of land, whose survey was directed by a special act of Congress, and there is nothing to show that in making the survey there was any intentional wrong on the part of the surveyors. Evidently the survey of the entire tract was completed before the lands, or any part of them, were offered for sale. According to statements in the brief of counsel for plaintiff in error as well as in the opinion of the Secretary of the Interior in *In re Christensen*, 25 L. D. 413, there were several islands in the Platte River within the reservation not surveyed. The Secretary says that it does not appear why the lines of survey were not extended over these islands, but in the brief of counsel as well as in the opinion of the Supreme Court it is stated that the instructions issued by the Land Department to the surveyors were to survey all islands of twenty-one acres and upwards. The reason of the Department or of the surveyors (whichever may have been responsible for the omission to survey these small islands) for these omissions is not disclosed. Possibly they may have been regarded as

having no stability as tracts of land but as mere sandbars, which are frequently found in Western waters, and are of temporary duration, existing to-day and gone to-morrow. Be that as it may, there is nothing to indicate any fraud or mistake on the part of the surveyors. Doubtless this island of about twenty-two acres was regarded as coming within their instructions, and very likely at the time of the survey did not contain even twenty-one acres. Further, an application for a survey of this island was refused, and this refusal was repeated once or twice. The Secretary of the Interior based his action on the decision of this court in *Grand Rapids & Indiana Railroad Company* v. *Butler*, 159 U. S. 87, and held that the Department was precluded from a survey and sale of an island after the lands on the adjacent banks of the river had been surveyed and sold. In the Grand Rapids case it appeared that the land on the east bank of Grand River had been surveyed in 1831, and that on the west bank of the river in 1837, and also that included in this last survey were four islands. Upon these surveys the adjacent land and the islands were sold and patented to private parties. In 1855 a parcel of ground in the river was, under instructions from the surveyor general, surveyed and marked "Island No. 5," and for that island a patent was issued to the railroad company. We held that the patent to the riparian owner issued before the date of the last survey conveyed to him the title to the island, saying (p. 95):

"We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud, and the Government has never taken any steps predicated on such a theory; and did not survey the so-called Island No. 5 until twenty-five years after the survey of 1831, and nearly twenty years after that of 1837."

These considerations furnish a sufficient answer to the question and sustain the decision of the Supreme Court of Nebraska.

It is further contended that the land of one of these patentee's is itself part of an island, and that therefore he has no riparian rights. It is sufficient reply to this contention that the Government surveyed and patented the lands up to the banks of the channel in which the island in controversy is situated, and a patentee, although his land may be itself surrounded by two channels of the river, has all the rights of a riparian owner in the channel lying opposite his banks.

Nothing herein stated conflicts with *Horne* v. *Smith, supra; Niles* v. *Cedar Point Club*, 175 U. S. 300; *French-Glenn Live Stock Company* v. *Springer*, 185 U. S. 47, or *Kirwan* v. *Murphy*, 189 U. S. 35. In the first of those cases it appeared that the survey stopped at a bayou and did not extend to the main channel of Indian River, a mile distant, and we held that the line of that bayou must be considered as the boundary of

the grant; that it could not be extended over the unsurveyed land between the bayou and the main channel of Indian River; that it was a case of an omission from the survey of land that ought to have been surveyed, and that such omission did not operate to transfer unsurveyed land to the patentee of the surveyed land bordering on the bayou. In the second we held that, as the survey showed a meander line bordering on a tract of swamp or marsh lands, the grant by patent terminated at the meander line and did not carry the swamp lands lying between it and the shores of Lake Erie. In the third, it appeared that there was no body of water in front of the meandered line, and we held that that line must, therefore, be the limit of the grant, and the fact that outside the side lines extended there was a body of water did not operate to extend the grant into any portion of that body of water. In the last of these cases the complainants, the owners of 859.38 acres as shown by the descriptions in their patents of fractional lots, claimed by reason thereof to be the owners of 1,202 acres lying between the meandered lines and a lake, and sought by injunction to restrain the Land Department from making a survey of these latter lands. We held that injunction would not lie, and that the officers of the Government could not be restrained from making a survey; that the rights of the complainants could be settled, after a survey and transfer of the legal title from the Government, by an action at law.

It is suggested in one of the briefs that this island extends up or down the river beyond the side lines of the tracts belonging to these riparian proprietors. A plat which is in evidence seems to support this statement, but the finding of the trial court, which is not disturbed by the Supreme Court, is to the effect that it lies between the tracts of the riparian proprietors. Of course, their title is only to the land which is in front of their banks and not beyond the side lines in either direction.

It must also be noticed that the Government is not a party to this litigation, and nothing we have said is to be construed as a determination of the power of the Government to order a survey of this island or of the rights which would result in case it did make such survey. As we reserve the rights of the United States we do not even impliedly sanction the intimation contained in the opinion of the court below that under the decision in *Hardin* v. *Jordan*, *supra*, although, on non-navigable waters, riparian rights were not conferred by the State law, nevertheless the land beyond the banks passed to the State in virtue of the patents of the United States to the lot owners. Upon that question we express no opinion.

Our conclusion, therefore, is that by the law of Nebraska, as interpreted by its highest court, the riparian proprietors are the owners of the bed of a stream to the center of the channel; that the Government, as original proprietor, has the right to survey and sell any lands, including islands in

a river or other body of water; that if it omits to survey an island in a stream and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Department, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or pre-emption entry. In such a case the rights of riparian proprietors are to be preferred to the claims of the settler.

We see no error in the judgment of the Supreme Court of Nebraska, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.